

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
SAN FRANCISCO BRANCH OFFICE**

**SUTTER CENTRAL VALLEY  
HOSPITALS, d/b/a MEMORIAL  
MEDICAL CENTER**

**and**

**Cases 32-CA-098873  
32-RC-128843**

**CALIFORNIA NURSES ASSOCIATION/  
NATIONAL NURSES UNITED (CNA/NNU)**

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for the Respondent/Employer.

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for the Petitioner/Charging Party.

**DECISION AND RECOMMENDED ORDER  
ON OBJECTIONS TO ELECTION**

STATEMENT OF THE CASE

**ARIEL L. SOTOLONGO, Administrative Law Judge.** This case was tried before me in Oakland, California, for 10 days between October 1 and 16, 2014, pursuant to a Compliance Specification issued in Case 32-CA-098873 by the Regional Director on July 30, 2014, and a Report and Recommendations on Objections (in Case 32-RC-12883), and Order Consolidating Cases and Notice of Hearing issued by the Acting Regional Director on August 15, 2014. Thereafter, on or about September 22, 2014, the General Counsel, Sutter Central Valley Hospitals, d/b/a Memorial Medical Center (Respondent or MMC), and California Nurses Association/National Nurses United (CNA/NNU) (the Union or the Petitioner), collectively called the parties, agreed on a Joint Statement of Stipulated Facts (JSSF) in Case 32-CA-098873 (GC Exh. 1(h)). Accordingly, since no issue of fact was in dispute regarding the Compliance Specification in Case 32-CA-098873, the testimony and other evidence presented

during the trial pertained primarily to the issues raised by the Union's objections in Case 32-RC-128843.<sup>1</sup> Because there is no factual dispute in Case 32-CA-098873, I will first address the issues raised by the Compliance Specification in that case.

## I. The Compliance Specification

### A. Finding of Facts

In their Joint Motion to Submit Stipulated Record to the Administrative Law Judge (GC Exh. 1(h)), the parties agreed that the Joint Motion and the following attached exhibits constituted the entire record of the Compliance Specification in Case 32-CA-098873:

1. Compliance Specification and Notice of Hearing in Case 32-CA-098873 (attached Exh. 1);
2. Respondent's Answer to the Compliance Specification (attached Exh. 2);
3. Stipulation of Facts (JSSF) (attached Exh. 3).

In the JSSF (Exh. 3 of the Joint Motion), the parties agreed to the following facts:

1. On November 25, 2013, Administrative Law Judge William L. Schmidt (the administrative law judge) issued his Decision and recommended Order in the unfair labor practice proceeding underlying this matter, in which he directed Respondent to, inter alia, cease and desist from engaging in certain specified conduct and in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act (the Act) and to post a Notice to Employees (the notice) at its facilities in Modesto, California, for a period of 60 days. (See attachment A, JSSF.)
2. On January 7, 2014, in the absence of exceptions, the National Labor Relations Board (the Board) adopted the findings and conclusions of the administrative law judge as contained in his Decision, and ordered that Respondent take the action set forth in the administrative law judge's recommended Order. (See attachment B, JSSF.)
3. Beginning about January 27 and 28, 2014, Respondent posted the notice in approximately 36 locations in its facilities for the required 60 days. (See attachment C, list of posting locations, JSSF.)
4. Beginning about January 27 and 28, 2014, Respondent posted a Memorandum to its employees (the Memorandum) alongside the Board-ordered notice. (See attachment D, JSSF.) The Memorandum was posted side-by-side with the notice in all locations where the notice was posted, for the duration of the 60-day posting period.
5. About March 30, 2014, after the 60-day posting period, the notice and the Memorandum were removed from all locations where they had been posted throughout the facility.
6. On May 8, 2014, Region 32 of the National Labor Relations Board (the Region) informed Respondent that it had determined that as a result of the side-by-side

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<sup>1</sup> There was thus no participation by the General Counsel during the trial, although there was an attorney for the Regional Director present at times during the proceedings, in order to represent the interests of the Regional Director and to provide the parties with documents, such as affidavits, in the Regional Director's possession.

posting of the Memorandum with the notice, the January 27 and 28, 2014 posting did not satisfy the remedial requirements of the Board Order. The Region requested Respondent to re-post the notice for an additional 60-day period, free of Respondent's Memorandum. On May 30, 2014, Respondent advised the Region that it would not comply with that request.

7. On June 4, 2014, the Board petitioned for summary enforcement of its January 7, 2014 Order.
8. On July 7, 2014, the United States Court of Appeals for the Ninth Circuit issued an unpublished decision in which it granted enforcement of the January 7, 2014, Board Order. (See attachment E, JSSF.)
9. On July 30, 2014, the Region issued a Compliance Specification and Notice of Hearing in this case. (Exh. 1 to the Joint Motion.)
10. On August 19, 2014, Respondent filed its answer to the July 30, 2014, Compliance Specification and Notice of Hearing. (Exh. 2 to the Joint Motion.)

The above-cited facts and exhibits thus constitute the entire record in the Compliance Specification in Case 32-CA-098873 (GC Exh. 1(h)). Accordingly, I find that the 10 above-enumerated paragraphs of the JSSF, including the attached exhibits, constitute the facts in Case 32-CA-098873.<sup>2</sup>

#### *B. Discussion and Analysis*

In his decision in Case 32-CA-098873, Judge Schmidt found that Respondent had unlawfully solicited grievances from its employees and impliedly offered to resolve them, and unlawfully interfered with solicitation and distribution of union literature by its employees. He dismissed a third allegation of the complaint, finding that it lacked merit. As described in the above Stipulation of Facts, when the notice to employees was posted pursuant to the Board Order, Respondent posted a Memorandum to employees by the side of the Board notice (the "side notice"). In the side notice, Respondent makes, inter alia, the following statements:

We strongly disagree with the ALs findings against MMC. We believe that our managers have acted lawfully at all times. . . . Although we disagree with two of the three findings, we have made the decision to forgo appealing the ALJ's decision and instead put the issue behind us and move forward . . . instead of dragging out and giving further attention to these claims that are in opinion, unfounded.

. . . . We dispute that [Chief Executive Nurse] Betty [Lopez] made any unlawful implied promise to employees, and remain committed to our long standing open door policy of addressing employee concerns as appropriate.

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<sup>2</sup> I note that in both the prior case before Judge Schmidt, as well as in the present representation case, Respondent admitted that it was engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act, and that the Union was a labor organization within the meaning of Sec. 2(5) of the Act. The Board's jurisdiction in this matter is thus not at issue.

. . . . We believe the manager did not unlawfully interfere with the employees' activities, as the employees had already stopped distributing for the day and the manager did not tell them to stop. . . .

5           The central issue in the Compliance Specification case is whether Respondent, by posting its side notice, failed to satisfy the remedial requirements of the Board (and subsequent court-enforced) Order. For the reasons discussed below, I conclude that it did.

10           The Board has long frowned on efforts by charged parties in unfair labor practice cases to diminish or negate the remedial effects of its orders or settlement agreements. This is especially true with regard to the posting of "side notices" that contradict or muddle the message of the Board notices, particularly when the posting of the Board notice is the only remedy required of respondent. *Bangor Plastics, Inc.*, 156 NLRB 1165, 1167 (1966), enf. denied 392 F.2d 772 (6th Cir. 1967); *Bingham-Willamette Co.*, 199 NLRB 1280, 1282 (1972). Moreover, noncompliance  
15 with remedial orders or settlement agreements has also been found when the charged party's contradictory message was conveyed not via a side notice, but by other means, such as strike papers, newsletters or distributed notices. *In re American Postal Workers Union, Local 735 (Postal Service)*, 340 NLRB 1363, 1364 (2003); *Teamsters Local 372 (Detroit Newspapers)*, 323 NLRB 278, 279-280 (1997); *Gould, Inc.*, 260 NLRB 54, 57-58 (1982).

20           The Board's rationale for rejecting side notices is clear: such notices dilute, diminish, and ultimately defeat the remedial purpose of Board notices. The facts in the present case are even more compelling than in the cases cited above. Whereas *Bangor Plastics* and *Bingham-Willamette* involved pretrial informal settlement agreements that contained nonadmission clauses  
25 (where the charged parties did not admit having violated the Act), in the present case an administrative law judge concluded that Respondent had violated the Act after the case was fully litigated. The remedial notice was accordingly posted pursuant to the judge's decision, which became final when Respondent chose not to pursue exceptions before the Board. Thus, Respondent, as a matter of fact and law, violated the Act. Yet, in its side notice to its employees,  
30 Respondent states that it "acted lawfully at all times," and generally denies that it engaged in the conduct found by the judge to have occurred, or denies that what occurred was unlawful. Respondent's side notice in essence invites employees to disregard the Board notice, for the "truth" is contained in its own message, never mind the fact that Respondent had its full day in court and that such "truth" did not prevail.

35           Such message plainly dilutes, diminishes, and defeats the remedial purpose of the Board-Ordered notice. Indeed, the impact of the side notice can best be exemplified by the testimony of union witness Melanie Thompson, a nurse employed by Respondent who testified in support of the objections in the accompanying case.<sup>3</sup> Thompson had also been a witness for the General  
40 Counsel in the trial before Judge Schmidt, whose decision had resulted in the posting of the

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<sup>3</sup> Objection 14 in the consolidated representation case, as discussed in that section of this decision, alleges that the posting of the side notice constitutes objectionable conduct. Although the testimony of Thompson was not one of the facts stipulated to by the parties in this matter, it is relevant to Objection 14, and as discussed later, I have credited her testimony. Moreover, I find that her description of other individuals' reaction to the side notice is not only applicable in this case, but can reasonably be assumed to represent what other employees' reaction in similar circumstances would be.

Board notice at issue in the present case. In describing the reaction of some of her fellow nurses upon seeing Respondent's side notice next to the Board's notice, she testified:

5 . . . . I am actually trying to remember the words because they were powerful, and I'm afraid I'm not going to do it justice. But the nurses felt that the effort that had been made by the nurses who had testified was almost futile because here was the National Labor Relations Board notice. I mean, as they said, Melanie, you went to court. You went to court for this. Here is the notice. And, look, right here next to it, Sutter's posted a letter that basically says, we don't really care a whole lot about what the National Labor Relations Board says. . . .  
10 (Tr. 770.)

15 Although perhaps not phrased in a legally elegant manner, Thompson's words perfectly capture the essence of the Board's rationale for rejecting charged parties' attempts to diminish the impact of Board notices by posting or distributing their own notices that contradict the Board's remedial message.

20 In its post-hearing brief, Respondent argues that the posting of the side notice is permissible because it has a constitutional right, as codified in Section 8(c) of the Act, to communicate to its employees its views on Board Orders. I reject this argument for the following reasons. First, Section 8(c) of the Act is inapplicable in this instance, because the General Counsel has not alleged, nor contends, that the posting of the side notice is an unfair labor practice. Rather, it alleges that by posting the side notice Respondent was noncompliant with the remedy ordered by the Board. Regarding the broader First Amendment right to communicate its views in general, I note that in the 80-year history of the National Labor  
25 Relations Act, the Board and the courts have long threaded a careful balance between constitutional protections and conduct proscribed by the Act. The time, place, and manner in which statements are made have always played a significant role in determining whether such statements are constitutionally protected or proscribed by the Act. Thus, statements by employers and labor organizations that might otherwise enjoy constitutional protection have  
30 often been found unlawful, or resulted in objectionable pre-election conduct, because they were coercive or threatening in the context of employees exercising their rights under Section 7 of the Act. Likewise, peaceful picketing by labor organizations, an activity that would otherwise be constitutionally protected, has frequently been found to be proscribed by the Act because the pickets conveyed their message in the wrong manner, at the wrong time, in the wrong place.

35 The General Counsel in essence alleges that Respondent, in this instance, conveyed its message in the wrong manner, at the wrong time, and in the wrong place(s), therefore diminishing and negating the remedial effect of the Board notice. By alleging that Respondent was not compliant with the Board-ordered remedy, however, the General Counsel does not seek  
40 a finding that Respondent violated the Act, or seek to preclude Respondent from expressing its dissatisfaction with the Board's findings and order. Respondent was free to express its views in a variety of ways that did not interfere with the lawfully-imposed remedy. The General Counsel further avers that the proper cure for such conduct is to require Respondent to post the remedial notice again, this time without interference. I agree, and conclude that by prohibiting the posting

of a side notice the Board is hardly imposing a constitutional burden on Respondent, while to allow such posting would completely negate the only remedy required by law and public policy.<sup>4</sup>

5 In light of the above, I conclude that Respondent's conduct in posting the side notice resulted in noncompliance with the Board Order, and that the unfair labor practices found by Judge Schmidt remain unremedied. Accordingly, I recommend that the Board order Respondent to re-post the notice to employees for the requisite 60-day period.

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<sup>4</sup> Respondent argues that notices posted pursuant to settlement agreements, as opposed to those posted as a result of a Board decision, are different because by entering into a settlement agreement the charged party has "voluntarily curtailed" its constitutional and 8(c) rights. It cites *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 145 (1967), for the proposition that First Amendment rights can be waived, thus suggesting that charged parties who enter into settlement agreements have (impliedly) waived their constitutional rights. Respondent misreads *Curtis*, a libel case where the plaintiff argued that the defendant had waived its First Amendment defense by failing to raise it before a lower court. In rejecting such argument, the Court plainly indicated that it will not find a waiver of constitutional rights in circumstances which fall short of being clear and compelling. I am not aware of any Board settlement agreements, particularly informal ones that contain a nonadmissions clause, that include or require an explicit waiver of constitutional rights, and thus the distinction made by Respondent between notices posted pursuant to settlement agreements and those posted pursuant to Board Orders after litigation is not a valid one. To the contrary, as discussed above, I find that the fact that Respondent had its day in court and lost makes the circumstances of this case more compelling. Indeed, the First Circuit Court of Appeals has ruled that precluding a charged party from posting a side notice does not abridge its freedom of speech, ruling that statements made in such side notices that express a determination to continue patently unlawful conduct will not be tolerated or protected. *NLRB v. Union Nacional de Trabajadores*, 611 F.2d 926 (1<sup>st</sup> Cir. 1979). There is an additional fatal flaw in Respondent's argument. If charged parties who enter into Board settlement agreements can be precluded from posting side notices, but charged parties who lose in litigation (as Respondent did) can post such notices, an absurd scenario would unfold. In this scenario, if a charged party who settles a case posts a side notice in violation of the settlement agreement, the Board's only option would be to rescind the agreement and proceed to litigation, as occurred in *Bangor Plastics, Inc.*, supra, and other cited cases. If the Board was to prevail in such litigation and the charged party is ordered to post a notice, it would then be able to post a side notice, resulting in an absurd and futile merry-go-round. I cannot imagine that the Board or the courts would create or approve such illogical and wasteful doctrine.

## II. Petitioner/Union's Objections to the Election

The Union filed a petition for election on May 16, 2014. Pursuant to a Stipulated Election Agreement approved by the Regional Director on May 27, 2014, an election by secret ballot was conducted on June 26 and 27, 2014, in an appropriate bargaining unit encompassing several hundred employees in various classifications employed by Respondent at its Modesto, California facility (herein referred to as MMC, which stands for Memorial Medical Center).<sup>5</sup>

The tally of ballots served on the parties at the conclusion of the election on June 27, 2014, showed that of the approximately 917 eligible voters, 352 voted for union representation, 462 voted against union representation, 29 votes were challenged (a number insufficient to affect the outcome), and there was 1 void ballot. On July 7, 2014, the Union timely filed 27 objections to the election, and on August 15, 2014, the Acting Regional Director issued his report and Recommendations on Objections, Order Consolidating Cases and Notice of Hearing. In his Report, the Acting Regional Director recommended that Objections 1 through 14, and 16 through 26 be set for hearing, and overruled Objections 15 and 27 (GC Exh. 1(e)). Thereafter, by post-hearing letters dated January 5 and 13, 2015, the Union withdrew Objections 12, 13, 19, 20, 26, and 22, 24, and 25, respectively. I approve the withdrawal of those objections.

Accordingly, at issue in this case are Objections 1 through 11, 14 through 18, 21 and 23. Below, I will discuss these objections in accordance to their numerical order, but first, I find it proper to provide some background information that is not truly in dispute, which will help provide the proper context for the discussion of the objections.

### A. Background

Respondent, a hospital and medical center in Modesto, California, commonly referred to as Memorial Medical Center (MMC), is part of a larger nonprofit corporate entity that owns and

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<sup>5</sup> The bargaining unit agreed upon by the parties was as follows: All full-time, regular part-time, and per diem Registered Nurses employed by the Employer at its facility located at 1700 Coffee Road, Modesto, California; excluding Cardiovascular RN Data Specialist, Clinical Nurse Educator-MFBC, Clinical Documentation Specialist, Clinical Nurse Educator, CNS/Clinical Research Coordinator, CVR Clinical Informaticist, CVR Lead Physician Information Educator, CVSA Inter Practical Modality Coordinator, Clinical Informaticist, ED Clinical Informaticist, ED Service & Quality Nurse, Infection Control Coordinator, Infection Control Nurse, Nursing Resource Coordinator, OR Material Coordinator, QM Risk Management Coordinator, Quality Management Reviewer, Resource Utilities Outcomes Coordinator, RN Case Manager, RN Clinical Research Nurse, RN Computer Project Liaison, RN Concurrent Review, RN ED Case Manager, CVR Ergonomic Coordinator, Healthcare Career Coordinator, Infection Prevention RN, JCAHO/CQI Coordinator, Nurse Practitioner, Patient Relations Coordinator – Risk Management, Quality Management Assistant, Surgical Services Business Supervisor, Workers Compensation Coordinator, Cancer Care Navigator, Nurse Educator, RNs in Cancer Clinical Trials department, RNs in Cardiac Rehab department, RNs in Education department, RNs in Employee Health & Disability Management department, RNs in Employee Health Services department, RNs in Nursing Administration department, RNs in Quality Management department, RNs in Risk Management department, RNs in Case Management department, RNs in Infection Control department, RNs in Safety Lab department, RNs in Survey & Joint Commission department, employees of outside registries and other agencies supplying labor to the Employer, employees represented by other labor organizations, all other employees, confidential employees, office clerical employees, managerial employees, guards, and supervisors as defined by the Act.

operates hospitals throughout California's central valley (Sutter Central Valley), headquartered in Sacramento, California. There are also other Sutter-affiliated medical facilities in the San Francisco Bay area and surrounding communities that are not part of the Sutter Central Valley group, but those are not germane to the issues in this case. In addition to MMC, Sutter Central Valley also operates a medical facility in Tracy, California ("Sutter Tracy"), a community located about 30 miles from Modesto. The Union was certified as the collective-bargaining representative of a certain unit of employees at Sutter Tracy, mostly including nurses, in March 2012, and the Union and employer have been engaged in collective-bargaining negotiations since that time. The parties have not reached a collective-bargaining agreement as of this time.<sup>6</sup> Some of the objections discussed below involve statements allegedly made by Respondent about the events at Sutter Tracy.

The Union began organizing at MMC in early 2012, according to undisputed testimony of then union organizer Alyssa Kang, who is currently a labor representative of the Union. The organizing efforts mainly consisted of having meetings with employees off Respondent's premises, and of "tabling," which is the term used for setting up a table on public property near the entrance of MMC. The Union had literature and sometimes food and beverages at this table, which it provided to MMC employees who showed interest (Tr. 957-961).<sup>7</sup> According to Kang's testimony, which is undisputed in that regard and I credit, the Union's organizing efforts were significantly "ramped up" or increased starting in February 2014, with the Union engaged in tabling almost every day, and holding more frequent meetings with employees. The Union at this time also hired additional organizers and staff and secured office space near MMC (Tr. 962).

As described above, the Union filed its petition on May 16, 2014, and the election was held over a 2-day period on June 26 and 27, 2014. The period between May 16 and June 27, 2014, will be referred to as the "critical period," pursuant to longstanding Board doctrine. *Ideal Electric & Mfg. Co.*, 134 NLRB 1275 (1961). It is Respondent's alleged conduct during the critical period, with one limited exception, that is the subject of the objections discussed below.

### *B. The Objections*

#### Objections 1 and 2

1. The Employer, Sutter Central Valley Hospitals, d/b/a Memorial Medical Center (Respondent or MMC) through its supervisors and/or agents, interfered with laboratory conditions and made a free election impossible by granting financial rewards to employees to induce them to vote against union representation.
2. Respondent, through its supervisors and/or agents, interfered with laboratory conditions and made a free election impossible by timing the announcement of a grant of financial rewards to employees to induce them to vote against union representation.

<sup>6</sup> On March 13, 2014 Administrative Law Judge Dickie Montemayor issued a decision in Case 32-CA-098549 (JD(SF)-07-14), finding that respondent Sutter Tracy had violated Sec. (8(a)(5) and (1) of the Act by unilaterally implementing certain changes in working conditions without giving the Union the opportunity to bargain. The case is currently pending before the Board on exceptions.

<sup>7</sup> These facts are also discussed in Judge Schmidt's decision in Case 32-CA-098873.



In support of these objections, the Union points to an undisputed fact: on May 16, 2014, Respondent announced, via email to its employees, that it was increasing its oncall/standby pay (OCP) from \$7 to \$9.25 per hour, effective June 1 (P. Exh. 5; R. Exh(s) 10; 11; 12).<sup>8</sup> The OCP increase was in fact implemented in June, about 3 weeks before the election. OCP is a system where employees agree to “stand by” and be ready to report to work within 30 minutes if called, in case of staffing shortages. Employees receive OCP during the period they are standing by, but if called and they report to work they are paid their regular wages. The increase in OCP affected many bargaining unit members, but also many other employees not in the bargaining unit.<sup>9</sup>

As discussed above, May 16, 2014 (all dates shall be in 2014, unless otherwise specified), is also the date the Union filed its petition (Jt. Exhs. 3; 4). It is well established that the “critical period,” during which “laboratory conditions” must be maintained, begins on the date of the petition filing and covers all conduct occurring on that date even if it occurs before the time of the day when the petition was filed. *West Texas Equipment Co.*, 142 NLRB 1358, 1360 (1963). At first glance, the increase in OCP announced and implemented during the critical period would appear suspect, because such wage increase affecting a large number of bargaining unit members would unquestionably have the tendency to be coercive. *STAR, Inc.*, 337 NLRB 962 (2002). The inquiry, however, does not end there. As the Board pointed out in *United Airlines Services Corp.*, 290 NLRB 954 (1988):

It is well established that the mere grant of benefits during the critical period is not, per se, grounds for setting aside an election. Rather, the critical inquiry is whether the benefits were granted for the purpose of influencing the employees' vote in the election and were of a type reasonably calculated to have that effect. *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964). As a general rule, an employer's legal duty in deciding whether to grant benefits while a representation proceeding is pending is to decide that question precisely as it would if the union were not on the scene. *R. Dakin [ & Co.*, 284 NLRB 98 (1987), *supra*, quoting *Red[']s Express*, 268 NLRB 1154, 1155 (1984). In determining whether a grant of benefits is objectionable, the Board has drawn the inference that benefits granted during the critical period are coercive, but it has allowed the employer to rebut the inference by coming forward with an explanation, other than the pending election, for the timing of the grant or announcement of such benefits. *Uarco Inc.*, 216 NLRB 1, 2 (1974). See, e.g., *Singer Co.*, 199 NLRB 1195 (1972).

Respondent offered evidence that the increase in OCP had been considered, decided upon and, announced before the Union filed its petition. Respondent's human resources director, Paula Rafala, testified that in the fall of 2013, she and Respondent's chief executive nurse (CEN), Betty Lopez, received complaints from department managers about their difficulties recruiting employees for standby duty.<sup>10</sup> In response, in October 2013, Rafala directed an aide,

<sup>8</sup> The Petitioner/Union's exhibits are designated as “P. Exh(s);” the Respondent/Employer's exhibits are designated as “R. Exh(s);” Joint exhibits are designated as Jt. Exh(s);” and General Counsel exhibits are designated as “GC Exh(s).”

<sup>9</sup> R. Exh. 5 shows the list of employee classifications covered by the OCP increase.

<sup>10</sup> OCP had been reduced in December 2011 from \$7.50 to \$7 per hour, not only at MMC but at the other three facilities operated by Sutter Central Valley (Tr. 1474, 1480; P. Exhs. 48; 49).

Gina Galvin, to start a market analysis to review what other medical facilities in the central valley and other northern California communities were paying their employees for oncall/stand by duties. (Tr. 1064-1066.) On October 16, 2013, Galvin, via email with an Excel spreadsheet attachment, provided Rafala with a comparative pay study of different medical facilities, including those that were Sutter-affiliated and some that were not. (Tr. 1067-1072; R. Exh. 6.) After Rafala reviewed the comparative pay study, she had discussions in late 2013 with CEN Lopez, as well as with Jo Ann Adkins, manager of surgical services, and Sharon Perry, the manager of the trauma department regarding oncall-pay, and decided to request additional information regarding the local market. Rafala contacted Julie Gonzalez and Susan Donker at Sutter Central Valley, who were, according to Rafala, compensations experts, to request additional information. (Tr. 1097-1098.)<sup>11</sup> The additional information was not provided until sometime in late April (2014), when Rafala received a second comparative pay study. This second study only added the pay figures of another nearby facility, Sutter Tracy, to the previously submitted group, and the parties stipulated that the pay rates reflected in this study were only current as to the end of 2013 (Tr. 1098-1105, 1381-1382; P. Exh. 37).<sup>12</sup>

After receiving the second study, Rafala prepared a cost analysis showing what the projected costs of increasing OCP at MMC would be, and submitted it to other managers via email. Beginning on April 24, Rafala exchanged a series of emails (with attachments), with various managers, including CNE Lopez and MMC's chief executive officer (CEO), Daryn Kumar, detailing what the projected costs of a proposed raise in OCP at MMC would be.<sup>13</sup> On Friday, May 9, Rafala via email to Lopez and Kumar, proposed that the administrative team (A Team) meet the following Monday or Tuesday to discuss her proposal to approve a raise in OCP (Tr.1098-1111; R. Exhs. 7; 8).<sup>14</sup>

According to Rafala's testimony, the A Team met on Tuesday, May 13, at which time they discussed and approved the OCP raise. The discussion and approval of the OCP raise is reflected in the minutes of the meeting, which were drafted and distributed afterwards. (Tr. 1122-1133, 1396-1397; R. Exh. 9.) After the meeting, Rafala prepared a draft of the announcement regarding the OCP raise to be distributed to the staff, and forwarded it via email attachment to the A Team on Friday, May 16, at 10:07 a.m. The email from Rafala states that the attached announcement regarding the raise in OCP will be sent to MMC managers by 12 noon, and to the rest of the staff by 4 p.m. on that day. (Tr. 1142-1143; R. Exh 10.) Later on the same day, May 16, Rafala sent an email attaching the announcement to all MMC managers at 12:26 p.m. and to all the MMC staff at 3:50 p.m. The announcement states that OCP would be raised from \$7 per hour to \$9.25 per hour effective June 1. (Tr. 1142-1153; R. Exhs. 10, 11, 12; P. Exh. 4.)

<sup>11</sup> Rafala testified that Donker was vice president for human resources at Sutter Central Valley, but gave no position for Gonzalez.

<sup>12</sup> Although there was little or no witness testimony about what these studies actually reflected regarding OCP, my review of the pay studies indicate that OCP at MMC was comparatively lower than in most of the facilities included in these two studies.

<sup>13</sup> The estimated cost of the OCP raise would be about \$406,775 for the year (Tr. 1121).

<sup>14</sup> Rafala also testified that she met with Kumar and Lopez either on Friday, May 9, or Monday, May 12, to discuss the proposed OCP raise to be discussed with the A Team. The A Team was comprised of CEO Kumar, CNE Lopez, HR Director Rafala, Chief Financial Officer (CFO) Tim Noakes, Assistant Administrator Jonathan Felton, and Philanthropy Director Jennifer Svihus (Tr. 1052; 1111-1112, 1126, 1680).

The above description of events related to the OCP raise is based on the testimony of Rafala, whom I credit. Her testimony was uncontradicted, and her demeanor was straightforward and matter-of-fact, even though she occasionally needed to have her memory refreshed by looking at documents. More importantly, her narrative of events is supported by documentary evidence, which appears, and I find to be, genuine.

The following sequence of events is either uncontradicted or stipulated to by the parties in the form of joint exhibits. At approximately 2:45 p.m. on the same day, May 16, Region 32 of the Board received the petition filed via fax by the Union, as reflected by the date stamp on the document (Jt. Exh. 3).<sup>15</sup> At approximately 4:59 p.m. (16:59), the Region faxed a copy of the petition to Respondent, along with a letter from the Regional Director explaining the procedures and events that would follow (Tr. 1173-1175; Jt. Exh. 4). Rafala picked up the fax at her office just as it was received, and immediately phoned Kumar and Lopez to inform them of the filing. (Tr. 1182.) Shortly thereafter, Kumar and Lopez notified the MMC staff, via email, that the petition had been filed. (P. Exh. 33.)

Based on the above facts, I find that Respondent has proffered a reasonable explanation as to the timing of the announcement of the OCP raise that rebuts the inference that the Union's petition—and coming election—was the motivation behind such raise. It is evident from the timing of the events that Respondent had no knowledge of the petition's filing when it decided, on May 13, to proceed with the OCP raise.

The Union raises several arguments on brief as to why Respondent failed to overcome the inference that the OCP raise was motivated by the election. First, it points to Respondent's history of announcing wage changes for the coming year at the end of the (preceding) year or the beginning of the new year, and argues that the increase in OCP in May 2014—almost midyear—was suspect. While it's true that there is evidence that Respondent typically announced yearly wage raises at the end of the year or the beginning of the year (see P. Exhs 50; 51) and announced the prior reduction of OCP in December 2011 (P. Exh. 14), Respondent has announced other wage changes at other times of the year (see R. Exh. 14, announcing elimination of per diem wages in April 2012). Accordingly, I find that there was no definitive pattern from which Respondent deviated that would negate its explanation regarding the OCP raise, which involved a limited number of staff, not a general yearly wage raise that included all.<sup>16</sup> Additionally, the Union argues that the manner in which the decision to raise OCP came about is suspect, again raising inferences about Respondent's motives. It points to the 6-month

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<sup>15</sup> The Union faxed the petition about 15 minutes earlier, but it was apparently not picked up from the fax machine and docketed by the Region until 2:45 p.m. (Tr. 1174; P. Exh. 32.) Additionally, union organizer Alyssa Kang, via text message starting at approximately 3:02 p.m. and by phone calls sometime later, notified a number of nurses that the petition had been filed. (Tr. 984-988, 993-996; P. Exh. 31.)

<sup>16</sup> See, for example, CEO Kumar's memo announcing "our *annual* wage and salary review" in January 2013 (P. Exh. 50, emphasis supplied). The Union also argues that the lack of Sutter Central Valley (SCV) management involvement in the decision to raise OCP at MMC in May was also suspect, given their prior involvement in the decision to lower such pay in 2011 (P. Exh. 14). The decision to reduce OCP in 2011, however, involved not only MMC but two additional Sutter facilities in the central valley, hence the need for central regional authority. Additionally, I note that there is no evidence of SCV management involvement in the decision to raise yearly wage raises in 2010 or 2013 (P. Exhs. 50; 51). Again, there is insufficient evidence of deviation by Respondent from a definite pattern of conduct so as to support any negative inferences.

time span between the initial wage study conducted in October 2013 and the revised wage study completed in April 2014, which contained only one small change from the initial study.<sup>17</sup> The Union argues that this delay is inherently suspect, and suggests that Respondent had decided, by November 2013, *not* to raise OCP in 2014, only to reverse course and accelerate its approval in (apparent) anticipation of the Union filing a petition in light of its increased organizational efforts. Simply put, such argument is pure conjecture unsupported by any evidence, and one that is plainly insufficient to overcome credited testimony backed up by documentary evidence. Finally, the Union argues that Respondent failed to properly explain its reasoning justifying the OCP raise, and points to Respondent's failure to elicit testimony from others involved in the decision to raise OCP, such as Lopez, Kumar, and others, to corroborate Rafala's testimony. I disagree. As previously discussed, I credited Rafala's testimony and found it sufficient to support a reasonable explanation for Respondent's actions, particularly in light of the lack of evidence that Respondent was aware of the Union's petition at the time it decided to implement and announce the OCP raise. As previously noted, Rafala's testimony was uncontradicted and supported by documentary evidence, and in my view her testimony survived rigorous cross-examination.<sup>18</sup>

Accordingly, as previously noted, I conclude that Respondent has satisfied its burden as described in *United Airlines Services Corp.*, *supra*. The evidence shows that both the decision to implement the OCP raise, and its announcement, occurred prior to it knowing about the union petition. Respondent proffered a valid explanation for its actions, and hence it cannot be concluded the "pending" election was the motive for its actions—because there was none at the time.<sup>19</sup> Without question, the sequence of events on May 16, the day the petition was filed, at minimum suggests that Respondent's announcement regarding the OCP raise that day was a phenomenal coincidence. Yet, suspect as it may be at first glance, the evidence shows that this is precisely what it was—a coincidence.

In light of the above, I recommend that Objections 1 and 2 be overruled.

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<sup>17</sup> The only change in the revised wage study was the addition of Sutter Tracy to the list of medical facilities. (Tr. 1381; P. Exh. 37.)

<sup>18</sup> Generally speaking, uncontradicted testimony needs no corroboration. I note that the Union cross-examined Rafala at length, and if it believed her testimony to be suspect or otherwise deficient, it had the opportunity to discredit her testimony or at least to plant sufficient seeds of doubt so as to force Respondent's hand to proffer additional testimony. Since I have concluded that Rafala's testimony is sufficient to meet Respondent's burden, I do not draw adverse inferences from Respondent's failure to call other witnesses in regard to that issue.

<sup>19</sup> The Union cites *Mercy Hospital Mercy Southwest Hospital*, 338 NLRB 545 (2002), in support of its contention that even if the initial decision to raise OCP had been made before the critical period, such raise is still objectionable because it was implemented during the critical period. I find *Mercy Hospital* is distinguishable. When the initial decision was made in that case, the employer had not decided any of the details of the raise, or decided its implementation schedule. The employer then decided the details of the raise and announced them *during* the critical period, well after the petition had been filed and when an election was pending. As the Board noted, the employer's only witness on the issue did not participate in the decision to implement the raise or in the decision about its announcement, and could therefore not explain the employer's justifications for the timing. Accordingly, the Board concluded the employer had failed to rebut the inference that the *timing* of the announcement was due to the pending election. In the present case, both the decision and the announcement occurred before Respondent knew of the petition, and therefore Respondent properly met its burden.

## Objection 3

3. Respondent, through its supervisors and/or agents, interfered with laboratory conditions and made a free election impossible by promising unspecified improvements in wages, benefits, or working conditions.

In support of Objection 3, the Union alleges that Respondent distributed a video (DVD) to all its bargaining unit employees during the critical period. The DVD was mailed to employees together with a cover note from MMC CEO Kumar requesting that they watch the video and to vote “no” in the election that was to be held on June 26-27. (P. Exhs. 2, 3.)<sup>20</sup> The contents of this DVD will be more fully analyzed below, as part of the discussion regarding union Objections 16, 18, and 21. At this time, with regard to Objection 3, I would note that other generalized allegation by the Union in its brief that the DVD contains a “compilation of veiled and not-so-veiled promises to improve working conditions if the nurses choose to bargain collectively,” the Union has failed to point specifically to any segment of the DVD where this occurs. In my review of the DVD, which I have watched on several occasions, I have also failed to detect any such *promises*, veiled or otherwise.<sup>21</sup> Accordingly, in the absence of any specific allegations or evidence pointing to such promises, I will recommend that Objection 3 be overruled in that regard.

In support of Objection 3, the Union also alleges that Respondent promised a benefit by agreeing to redress employee concerns after soliciting their grievances. Since this allegation is closely tied with Objection 4, I will discuss it below. Additionally, in support of Objection 3, the Union alleges that in June, prior to the election, Respondent’s CEO, Kumar, mailed unit employees a “Compensation and Benefits Value Statement,” which listed the total package of salary and benefits received by each individual employee. (Tr. 68; P. Exhs. 7, 23.)<sup>22</sup> There is no evidence that there was a promise to improve these benefits or threat to take them away, however, and the Union has proffered no authority for the proposition that merely reminding employees of the benefits they receive is coercive and therefore objectionable conduct. Indeed, the Board has held that it is not. *Suburban Journals of Greater St. Louis, L.L.C.*, 343 NLRB 157 (2004); *Langdale Forest Products Co.*, 335 NLRB 602 (2001); *United Technologies Corp.*, 226 NLRB 750 (1976). Accordingly, I recommend that Objection 3 be overruled in this regard. The Union also alleges that the granting of the OCP increase, as alleged in Objections 1 and 2, also constitutes a promise of unspecified future improvements. I reject this argument, and note that I recommended the overruling of Objections 1 and 2.

Finally, in support of Objection 3, the Union alleges that during the critical period Respondent temporarily increased staffing in order to provide relief for nurses who otherwise would have had too many patients. Although, if true, this conduct would not represent a *promise* of a benefit but rather the *granting* of one, I will discuss this allegation, since such conduct would arguably be objectionable. In support of this allegation the Union (in its brief) cites the

<sup>20</sup> The DVD was produced by consultants retained by Respondent as part of its election campaign, as discussed below.

<sup>21</sup> The allegations that the video also contained implied *threats* will be discussed below.

<sup>22</sup> The statements were apparently tailored to each individual recipient, showing the exact total amount of salary and benefits that each particular employee was receiving.

testimony of Teresa Saltos, a nurse in the telemetry department.<sup>23</sup> Saltos testified that she and other nurses in her department would often find themselves taking care of more than four patients at a time, a practice that Saltos described not only as onerous, but which she and the Union contend is in violation of State and Federal regulations.<sup>24</sup> Saltos stated that during the critical period she started noticing “floaters” (nurses from other departments) come into her department to provide relief so that no nurse had more than four patients to take care of at one time. She further testified that this practice, which did not occur prior to the filing of the petition, ceased after the election. (Tr. 1267-1270.) In her testimony, CNE Betty Lopez, specifically denied that Respondent changed any staffing practices during the critical period, and testified that inspections by State and Federal agencies (apparently triggered by anonymous complaints) did not find any regulatory violations (Tr. 1619-1621).<sup>25</sup>

I found Saltos to be a credible witness generally (as will be discussed later), but I also found Lopez to be credible regarding this issue. I note that Saltos was the only witness, among 14 called as witnesses by the Union, to testify as to this alleged staffing change, so I must infer that this did not occur in other departments, and may not have been noticed by other nurses in Salto’s department. Even if I were to credit Saltos in this regard, I must conclude that this conduct was isolated and limited, and that there is no evidence of dissemination among the bargaining unit, which I note is large. In light of these factors, I find this conduct was de minimis and did not interfere with the election, and thus recommend that this objection be overruled. *Archer Services*, 298 NLRB 312 (1990).

#### Objection 4

4. Respondent, through its supervisors and/or agents, restrained and coerced employees, interfered with laboratory conditions and made a free election impossible by soliciting grievances from employees.

In support of this objection, the Union called several witnesses and introduced various documents produced by Respondent pursuant to subpoena. The witnesses who provided testimony for the Union in this regard were Starlene (Star) Yager, Irene Boyd, Donna King, Lisa Villareal, Melanie Thompson, Sharon Waite, and Teresa Saltos, all long-term employees of Respondent, and all still currently employed there with the exception of Yager.<sup>26</sup> The evidence elicited from these witnesses, as well as the documentary evidence, describe what occurred

<sup>23</sup> Additionally, during the trial I requested that the Union indicate which objection(s) each of its witnesses would be testifying to, and Saltos was the only one that testified regarding Objection 3.

<sup>24</sup> This issue generated some heated arguments between the parties, with the Union accusing Respondent of repeatedly violating health regulations by “short staffing” and Respondent adamantly denying so. I permitted only very limited testimony in this regard, because I did not want the trial to veer off into tangential issues that are not material to the issues before the Board, nor subject to the Board’s jurisdiction, and which would have unduly prolonged the proceedings.

<sup>25</sup> Respondent sought to introduce summaries reflecting the amount of staff scheduled during various time periods, but I declined to admit such proposed exhibit, because the underlying data from which the summaries were derived was not provided to the Union.

<sup>26</sup> Yager separated from employment in July 2014.

during “rounding” by groups of managers beginning on the evening of May 16.<sup>27</sup> Briefly summarized, all the above-named union witnesses testified that beginning on the evening of May 16, groups of two to three managers began descending on their departments, seemingly out of the blue, and engaging nurses in conversations, asking them how things were going, and offering to answer questions, and help with any problems. These managers were typically not low-level supervisors, but rather department managers or individuals in administrative positions who had rarely visited, let alone worked in, the departments they were now visiting. These roundings took place at all times of the day and night, as well as on weekends. Most of the witnesses testified that they and their fellow nurses were surprised, bemused, or even amused by the sudden attention being bestowed on them, and some testified about being made to feel uncomfortable.

For example, Teresa Saltos testified that approximately at 11:30 p.m. on the evening of May 16, Managers Carroll Ilog, Annabelle Dickerson, and Nancy Collier came into the nursing station at the telemetry department where Saltos works.<sup>28</sup> According to Saltos, Ilog (who was speaking for the managers) told Saltos and other nurses in the area that they were there to see if the nurses had “. . . any patient-care issues, if they could help us with any concerns, that they were there for us then and in the future if we had any questions or issues regarding our working conditions with them.” (Tr.1235-1237, 1310.) Saltos responded that while it was very nice to see management on the floors, she was very surprised to see them, because in her 7 years working there she had never seen managers from other departments come by, specifically at night, to see “what we need or what they can do for us.” Saltos told the managers that part of her surprise was due to the fact that a few months previously, a group of nurses had delivered a letter to Betty Lopez voicing their concerns. Lopez, she said, had never responded, and suggested that the managers’ visit must be due to Kumar’s message (his email announcing the filing of the petition earlier that day). (Tr. 1238, 1309-1311; P. Exh. 33.)<sup>29</sup> Ilog asked if Saltos had a copy of the letter to Lopez, and Saltos replied that she did not, but that Ilog could get a copy from Lopez’ office. According to Saltos, Ilog stated that the three managers were part of a nursing committee to see if the nurses had any patient-care issues or safety issues, and that was the reason for their visit, denying that it had anything to do with Kumar’s message. Saltos further testified that at this point, Catherine Palaban, the charge nurse at the telemetry department who had been among the nurses listening, told Ilog that she was surprised to see managers from “other floors” come to telemetry, because there was a chain of command through their own department to follow, and that nurses should have been alerted so they would feel comfortable speaking to other managers (Tr. 1235-1236, 1238-1239). Saltos also testified that for the following several weeks, she saw managers from other departments, including Sergio Camarillo, Larry Quintero, Carlo Jimenez, Allan Hege, and Betty Lopez, rounding in her department on almost every shift she worked.

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<sup>27</sup> “Rounding” can best be described as a shortened version of “making the rounds.” It is used not only in the context of doctors and nurses visiting with their patients, but is also used to describe managers visiting various departments, or union supporters visiting employees in other departments while off duty to elicit support for the Union. (Tr. 704-705.) The term is also described in Judge Schmidt’s earlier decision in Case 32-CA-098873.

<sup>28</sup> Ilog, Dickerson, and Collier are admitted supervisors of Respondent. A complete list of Respondent’s admitted supervisors is contained in a stipulated joint exhibit (Jt. Exh. 1). Ilog is the assistant manager for the surgical unit; Dickerson is assistant manager of the observation unit; and Collier is assistant manager of the surgical unit at Spanos Court, which is in a separate building adjacent to MMC’s main facility.

<sup>29</sup> In August 2013, a group of MMC nurses had delivered a letter, under the Union’s letterhead, to Lopez’ office (Lopez was not there at the time) listing some of their concerns. ( (Tr. 1242-1244; P. Exhs. 34, 35.)

Saltos stated that she felt like the managers were “on parade” and made her nervous, giving her the sensation that the nurses were being watched. Finally, Saltos testified that the roundings by managers stopped altogether following the election (“haven’t seen them since”). (Tr. 1256-1258.)

Ilog, the manager who Saltos testified had been the spokesperson for the rounding managers on the evening of May 16, did not testify. Nancy Collier, one of the managers with her that evening, testified instead. Collier’s account of this event varies from Saltos’ in only two significant ways. First, Collier testified that this event happened on the evening of May 17, not May 16. Second, Collier denied that Ilog or anyone in their group said anything about “working conditions,” but rather stated that they were there to talk about “safety,” both the patients’ as well as the staff’s. Collier admitted that she had never rounded on weekends or in units other than her own before.

Documents produced by Respondent under subpoena support Collier’s testimony that these events occurred on the night of May 17, not May 16. The same documents, however, undermine Collier’s testimony while supporting Saltos’ version in more important respects. Starting in the evening of May 16, Lopez and her managers exchanged emails discussing the filing of the petition by the Union and providing detailed instructions by Lopez to her managers on what to do during the roundings they were about to embark on, including how to talk about the Union. Lopez directed her managers to report back after their roundings regarding what had occurred and what the employees were saying (P. Exhs. 38, 39; R. Exh 22). There are at least two reports that describe the events on the evening of May 17, between 10 p.m. and 12 a.m., written by either Ilog, Collier, or Dickerson, it is not clear which of them. One of the reports (P. Exh 38, on p. 6 [MMC 1303], item (8), contains the following narrative:

Tele-3-Teresa S.-she stated about 2 months ago there were a group of staff that turned in a request to meet with Betty Lopez with signatures of about 30-40 nurses. She said she did not hear anything about it being looked into. *We asked what their concerns were* and she stated floating and staffing. She is very curious why management rounding is being done now because it was never done before and is it because of Daryn’s e-mail? Annabelle answered that management rounding was done about *2 years ago* and this rounding is about patient *and staff* safety (emphasis provided).

Item 9 of the same narrative also confirms Saltos’ testimony that Charge Nurse Catherine Palaban told the visiting rounding managers that they were violating protocol by not going to the managers in the telemetry department first. On page 4 of the same exhibit (P. Exh. 38, MMC 1301), there is again a reference to Saltos, described as prounion, complaining that in her 6 years working there she has never seen rounding, and attributing such rounding to the filing of the petition. The rounding managers reportedly assured Saltos that they were there as part of the “Patient Safety First” program, and “wanted to hear directly from the staff of their concerns for patient *as well as staff* safety.”

I credit Saltos’ testimony, not only because I found her testimony to be assertive, rich in details, and unflinching during cross-examination, but because Respondent’s own documents, as described above, support her version of events. Collier, on the other hand, initially denied



having received any instructions from Lopez, prior to the roundings, about what to do during the roundings, or instructions on how to talk about the Union, only to be impeached by Respondent's documents showing the opposite. (Tr. 1729-1730, 1747-1751; P. Exh 39; R. Exh. 22.) Accordingly, I do not find Collier credible in this regard.

As noted above, other union witnesses also testified about the roundings that began shortly after the filing of the petition and continued throughout the critical period. Lisa Villareal, a nurse who is assigned to "med/surg" unit (postsurgical patients), but who also works or "floats" in other units as needed, testified that on June 21 she was working at the surgical unit, her "home" unit. On that day Villareal saw Kuldip Maderr, the assistant department manager of the operating room (OR), at the nurses' station in the surgical unit, a unit where she had never seen Maderr before. Villareal testified that Maderr approached her, introduced herself, and said she was there rounding to see how "we were doing and if we had any questions or concerns." (Tr.566-568.) Maderr did not testify, and Villareal's testimony is uncontradicted. The following day, on June 22, Villareal testified she was working in the pediatric unit. While there, she was approached by three managers, Glenda Concepcion (nurse department manager, and Villareal's immediate supervisor), Maderr, and a third manager whose name Villareal could not recall, but who worked in radiation oncology. Concepcion asked Villareal how she was doing, "and just wanted to let us know that they were there to see if we had any questions or concerns." The other two managers introduced themselves and mentioned they were having lunch in the breakroom, provided by MMC. (Tr. 569-571.). None of the above-named managers testified, and I credit Villareal's testimony, which is uncontradicted.

Melanie Thompson, a nurse who works in the intensive care unit (ICU) testified that on or about May 19, which was the first day she was scheduled to work after the petition was filed, she noticed an increased presence of managers from other departments in her unit. Sometime between May 19 and 21, Thompson saw Jon Felton and an IT manager whose name she cannot recall in the ICU. Thompson, who was wearing a button identifying herself as a union supporter, approached the man with Felton, introduced herself and asked him why he was in the ICU. He responded, "Well, I am here to answer questions and see what I can do to help." When Thompson asked him *why* he was doing that, he answered, "[W]ell, you know why I am." (Tr. 712-1714.) Neither Felton nor the other manager testified, so I credit Thompson's testimony.<sup>30</sup> During the following several weeks until the election, Thompson testified that she saw other managers from outside her unit rounding in her department, including Kitty Baker, Sandra Drumonde, Lorry Quintero, and Jo Ann Adkins. (Tr. 715-516.)<sup>31</sup>

Starlene (Star) Yager, who worked as a nurse (as sometime manager) at MMC for 25 years until July 2014, testified that she was working in the post- Anesthesia Recovery Unit (PACU, also known as recovery room) during the critical period. She started to see Jo Ann Adkins, a manager in the surgery unit, rounding in her unit about twice per week, which Yager

<sup>30</sup> Felton, as previously discussed, was identified by Rafala and Lopez as Respondent's assistant administrator, a member of the "A Team." As one of Respondent's highest ranked managers it is reasonable to infer that he would not have been rounding with the other individual unless he too was a manager.

<sup>31</sup> Leona (Kitty) Baker is assistant manager of the telemetry unit; Sandra Drumonde is nurse department manager; Lorry Quintero is director of patient care services; and Jo Ann Adkins is nurse department manager for surgical services. (Jt. Exh. 1.)

said was unusual because she had rarely seen Adkins in her unit. During one of these occasions in early June, Adkins approached Yager and asked if she had any issues or anything that needed to be addressed. Yager testified this was unusual because Adkins had never addressed her before. (Tr. 173-174, 176.) Additionally, Yager testified that she saw Nancy Collier rounding in her unit during the critical period, but did not testify about any conversations with Collier. Adkins testified, but did not testify about the above-described conversation with Yager. I credit Yager's testimony, which is uncontradicted.

Sharon Waite, a nurse in the Intensive Care Unit (ICU) testified that sometime during the critical period, between May 16 and June 26, he saw Betty Lopez and Jo Ann Adkins rounding in her department. Waite heard Lopez tell a nurse "if you have any questions, give me a call. If there is anything I can do for you . . . I'll take care of it." Waite also heard a nurse ask Lopez if these roundings would continue after the election, and Lopez replied that they would. According to Waite, she had never seen Lopez in the ICU before, or since. (Tr. 630-633.) Lopez denied ever rounding in the ICU, stating that she usually rounded in the emergency room (ER) and the cardiac telemetry department, which are in a separate wing of the hospital. (Tr. 1606-1608.) I credit Waite's testimony. In so doing, I note that it is far more likely that Waite would remember if she saw the head nurse at MMC, Lopez, in her department, which was apparently a rare sighting, than for Lopez to remember every department where she rounded, which by many accounts were numerous. Moreover, Lopez' conduct was consistent with what multiple accounts has managers doing during the critical period.

Finally, Irene Boyd, who works as a per diem nurse, testified that on or about May 18, ER Assistant Manager Karen Turner, who was accompanied by another individual who Boyd could not identify, asked Boyd whether she had any safety issues (Tr. 262-264).<sup>32</sup> Turner did not testify.

The Union contends that the conduct by the rounding managers during the critical period amounted to objectionable solicitation of grievances that interfered with the election by tainting the laboratory conditions required during that period. For the following reasons, I conclude that it did.

The Board has long held that, in the absence of a previous practice of doing so, the solicitation of grievances by an employer during an organizational campaign violates the Act when the employer promises to remedy those grievances. See, e.g., *Uarco Inc.*, 216 NLRB 1, 2 (1974). The solicitation of grievances alone is not unlawful, but it raises an inference that the employer is promising to remedy the grievances. *Blue Grass Industries*, 287 NLRB 274 fn. 4 (1987). This inference is particularly compelling when, during a union organizational campaign, an employer that has not previously had a practice of soliciting employee grievances institutes such a practice. *Amptech, Inc.*, 342 NLRB 1131, 1136 (2004). While an employer who has had a past practice and policy of soliciting grievances may continue to do so during an organizational campaign, an employer cannot rely on past practice if it "significantly alters its past manner and methods of solicitation during the campaign." *Baptista's Bakery, Inc.*, 352 NLRB 547 (2008); *House of Raeford Farms*, 308 NLRB 568, 569 (1992), enf. mem. 7 F.3d 223 (4th Cir. 1993),

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<sup>32</sup> A per diem nurse is essentially an "on call" employee who works for different employers, who call them on an as-needed basis.

cert. denied 511 U.S. 1030 (1994). While the above cases primarily involve situations in which the alleged solicitation was also found to violate Section 8(a)(1) of the Act in addition to being objectionable conduct, I note that no *fresh* unfair labor practices are alleged in the present case. Rather, the consolidated “C” case is a *compliance* specification case in Case 32-CA-098873 that involves failure to comply with a Board remedy. I also note that the unfair labor practices that occurred in that case long preceded the filing of the petition. Accordingly, the standard to be applied in the present *objections* case is whether the misconduct, taken as a whole, warrants a new election because it has “the tendency to interfere with employees’ freedom of choice” and “could well have affected the outcome of the election.” *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995); *Metaldyne Corp.*, 339 NLRB 352 (2003).

In the present case, the credited testimony of Saltos, Villareal, Thompson, Yager, Waite, and Boyd, corroborated by Respondent’s internal documents, shows that numerous managers, within 24 hours of the petition being filed, started roaming the halls of Respondent’s facility asking nurses how they were doing and asking if they had any concerns regarding their safety, that of patients, or any other concerns, and offering to help with these.<sup>33</sup> The testimony of these witnesses also establishes that such conduct was unprecedented in scope, frequency, and nature, including the involvement of numerous managers they had rarely, if ever, seen in their departments before. The credited testimony also reflects that these roundings ceased immediately following the election, which Respondent admits.

The timing, nature, and scope of these roundings, at minimum, raises a strong inference, if not outright presumption, that the conduct was aimed at affecting the outcome of the election, and shifts the burden to Respondent to prove otherwise. Respondent failed to do so. During the trial and in its post-hearing brief, Respondent admitted that the rounding by managers was part of its campaign against the Union.<sup>34</sup> Given the evidence, particularly as reflected in its own internal documents, Respondent would be hard-pressed to argue otherwise. Yet, this is precisely what some of Respondent’s managers tried to do when confronted by nurses who questioned the timing and motive for the roundings. For example, when Saltos suggested that the managers were there because of Kumar’s email (announcing the filing of the petition), Ilog adamantly denied that was the case, suggesting instead that they were there as part of a “safety” campaign. This was confirmed by the managers’ report to Lopez, which states that they informed Saltos and the other nurses that their rounding was “about patient and staff safety.” (See P. Exh. 38, discussed and quoted above.) Yet, neither Lopez nor any other upper-echelon manager attempted to correct such disingenuous misinformation after it was plain that this is what the managers were telling employees.

It is well established, as Respondent points out in its brief, that employers have a right to campaign against a union attempting to organize its employees, and to express views against unionization as long as no coercion or threats are involved. The credited testimony and evidence

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<sup>33</sup> Saltos, whom I credited, testified that Ilog asked her about her “working conditions.” Even if Ilog or other managers did not use that exact term, however, this was clearly the import of their message, as reflected in the responses of the nurses, who responded with complaints about being short staffed, etc.

<sup>34</sup> Chief Executive Nurse Betty Lopez testified that the rounding by managers was part of Respondent’s efforts to make front-line managers “visible” during the campaign, to engage in conversations with employees about the Union so as to offer Respondent’s point of view. She directed managers to report back to her regarding what employees were saying. (Tr. 1604-1605, 1657-1659.)

that describe the roundings, however, shows that in many instances managers were not discussing Respondent's views about the campaign, but were instead asking employees what concerns and problems they had and offering to help. Indeed, the managers' conduct in many instances can fairly be described as solicitous, if not outright obsequious. Plainly, this constituted solicitation of grievances with the implied promise to resolve them. Moreover, this conduct was widespread, carried out repeatedly throughout the bargaining unit during the critical period by high-level managers, and accordingly could well have affected the outcome of the election. *Cambridge Tool & Mfg. Co.*, supra. *Avis Rent-A-Car System*, 280 NLRB 580, 581 (1986); *Cedars-Sinai Medical Center*, 342 NLRB 596 (2004).

Respondent argues, as it did in the prior unfair labor practice case before Judge Schmidt (Case 32-CA-098873), that it had solicited employee grievances in the past. Just as occurred in the prior case, however, Respondent failed to meet its burden to establish such past practice by introducing any significant or plausible evidence in that regard. Lopez testified that she and other upper-level managers have conducted "leadership" rounding in the past, which she described as visiting various departments to check how things were going. Obviously, there is nothing wrong with such practice, which is an effective and well-established business practice in most industries to show the "troops" that management cares and is on top of things. There is no evidence, however, that it was an established practice for Lopez or other managers to solicit grievances and offer to remedy them during these leadership roundings, let alone on the scale and to the extent that was practiced during the critical period. Indeed, the record suggests that Respondent never accepted Judge Schmidt's conclusion that it had engaged in unlawful solicitation in Case 32-CA-098873, as evidenced by the language of the side notice discussed in the first part of this decision. Respondent apparently "doubled down" on such conduct during the critical period, perhaps as a way to reassert its views that such conduct was perfectly legal and permissible. It did so at its peril.

Accordingly, I conclude that Respondent engaged in objectionable pre-election conduct during managerial roundings in the critical period by soliciting grievances from its employees and impliedly promising to remedy them, and recommend that Objection 4 be sustained in that regard.

The Union additionally asserts that Respondent solicited grievances by placing or installing "huddle boards" in various departments during the critical period. In essence, huddle boards are like bulletin boards placed on the wall where best practices and procedures are discussed to call the staff's attention to various issues, and in which employees were encouraged to contribute comments or suggestions. According to union witness Lisa Villareal, she first noticed huddle boards going up in the surgical unit in late May, after receiving an email from Manager Glenda Concepcion that announced the huddle boards. (Tr. 552-554; P. Exh. 19.) Villareal described huddle boards as "a board that a nurse or any staff member will put down a concern that they have or a need they might have on the unit, something they think could be improved," adding that management would then assign someone to address the issue and put down what was being done to correct the issue (Tr. 548).<sup>35</sup> As discussed below, however, huddle

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<sup>35</sup> A photograph of such a "huddle board," which bears the caption "Problem-Countermeasure Board" appears as P. Exh. 18. The photo was taken in October, long after the critical period, so it was not offered or received for the substantive content of the messages that appear there, but as an example of what such boards looked like.

boards were much more than that, and it appears that Respondent began placing them up months before the critical period.

5 Betty Lopez testified that when Daryl Kumar became Respondent's CEO in 2012, he informed her and other managers that safety would be a priority at MMC. Soon thereafter, Respondent began putting up "Good Catch" boards throughout the facility, where important tips were discussed about safety procedures and examples were provided of "good catches" that staff had made in preventing potential mistakes or errors that could have compromised the safety or health of patients or staff. The staff was thus encouraged to raise safety-related concerns, and these concerns were made part of these boards. (Tr. 1558-1569; R. Exh. 18.) According to 10 Lopez, the "Good Catch" program evolved into the huddle boards, which first appeared in the renal telemetry department in October 2013. Indeed, an email dated October 30, 2013, attaching a photo of the "Huddle Board" in renal telemetry was introduced into evidence (Tr.1577, 1589-1594; R. Exh. 21). Additionally, Lopez testified that several months before the October 2013 15 introduction of the huddle board in renal telemetry, these boards had been placed in ancillary departments such as laboratory, radiology, and environmental services. The rollouts of these boards were implemented at various times before the critical period, some during the critical period, and some after, and these boards remain in place. It was up to the different department managers to decide when to implement the huddle board program. (Tr.1596-1602.) I credit 20 Lopez' testimony on this issue, which I found credible and supported by documentary evidence.

In light of the above, I am persuaded that the "huddle boards" program was first conceived and implemented long before the critical period, and that its main purpose was not to solicit "grievances," as alleged by the Union, but rather to involve employees in contributing to a 25 culture of safety. Such culture is obviously of critical importance in the health-care industry, and it would not be a wise policy to discourage such practice. While I found Villareal to be generally credible, I believe she misconstrued the purpose and intent behind these boards, as did the Union.

Accordingly, and for the reasons discussed above, I recommend that Objection 4 be 30 overruled as it relates to the huddle boards, but be sustained as to grievance solicitation during roundings by managers.

#### Objections 5, 6, and 11

35 5. Respondent, through its supervisors and/or agents, restrained and coerced employees, interfered with laboratory conditions and made a free election impossible by materially assisting employees opposing union representation.

40 6. Respondent, through its supervisors and/or agents, restrained and coerced employees, interfered with laboratory conditions and made a free election impossible by permitting the posting of literature opposing unionization in areas previously strictly limited to official hospital announcements.

45 11. Respondent, through its supervisors and/or agents, interfered with employees' rights to be fully informed about arguments concerning union representation by destroying and/or confiscating pronoun literature while permitting other nonwork-related literature and

antiunion literature to remain, and thus interfered with laboratory conditions and made a free election impossible.

I have grouped the above-three objections together because they have a common thread, which is the alleged disparate treatment by Respondent, primarily involving the posting or distribution of literature, between prounion and antiunion employees. As a way of background, it is undisputed that a group of MMC employees, apparently operating under the banner of “Union free at MMC,” actively campaigned against the Union during the critical period. It is also undisputed that prounion literature, T-shirts and flyers, as well as union pins and buttons (see, e.g., P. Exh. 21), were red in color or had a red highlight, whereas literature, T-shirts and flyers distributed or posted by the antiunion group of employees were a bright or neon green in color. Literature and memoranda by Respondent, on the other hand, typically displayed the official teal blue “Sutter Health Memorial Medical Center” letterhead or logo. (See, e.g., Tr. 1278-1279.) Thus, all witnesses generally agreed that it was easy to distinguish the origin or source of the literature/flyers/T-shirts by the color or logos. Finally, I note there is no evidence that Respondent played a role in the formation, supervision, or control of the antiunion employee group. What is in dispute, as the above-cited objections allege, is whether Respondent assisted this group or hindered the prounion employees through the formulation and/or enforcement of policies regarding the posting and distribution of campaign literature.

In support of Objection 5, the Union, offered the testimony of Romel Mathias.<sup>36</sup> Mathias testified that around 6:15-6:30 a.m. on the morning of June 26, the first day of the election, he observed a woman park her white pickup truck near the main entrance to MMC, and post numerous bright green antiunion signs throughout the area, all on MMC property (Tr. 277-283). The posting of these signs is not in dispute, and can clearly be seen in a series of photographs Mathias took at the time (Tr. 284; P. Exhs. 11(a) through (j)).<sup>37</sup> Without doubt, anyone entering or exiting the facility could not avoid noticing these signs, which were numerous and repetitive. It is also not disputed that these signs stayed up until about 8 a.m., when Lopez arrived at work, and upon seeing the signs ordered security to remove them. (Tr. 1637-1638.)<sup>38</sup> Lopez also testified that she later learned, from the security department, that after being removed the signs were returned to the person who had posted them, Judy Humphrey. It is not clear how the security department learned that Humphrey had posted the signs, nor is there evidence whether Humphrey requested that the signs be returned to her.

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<sup>36</sup> During the trial, I requested that the Union identify the objection(s) that each of its witnesses’ testimony would be supporting. In support of Objection 5, the Union at trial indicated that witnesses Mathias, Silva, Villareal, and Saltos would testify as to Objection 5, among others. In its brief, however, the Union only discussed the testimony of Mathias with regard to Objection 5, apparently because it believed that the other witnesses’ testimony best supported other objections. Accordingly, I will only address Mathias’ testimony.

<sup>37</sup> The signs bore various messages, including “No Union” (or with the word “union” in a circle with a diagonal slash across it), “Union Free at MMC,” “Unions Segregate Vote No,” “No Union,” “Union Not Needed,” “Protect Patients,” etc. Additional signs were also posted along Coffee Road, a public road outside but near MMC property. Coffee Road is the public road that those wanting to enter or exit MMC must use, at least on that side of the property.

<sup>38</sup> These notices were posted adjacent to, and visible from, Respondent’s administrative wing, but Lopez testified that no one was present in those offices until 8 a.m. when she and her administrative assistant, Maggie Hubbard, arrived.

The Union argues that by permitting the posting of these antiunion flyers on MMC property on the day of the election, or at least by not taking them down fast enough, Respondent materially assisted the faction of employees opposing unionization. It further asserts that by returning the removed flyers to the employee who posted them, Respondent was engaged in disparate treatment and assisting the antiunion faction because it did not do the same for union flyers or literature that were removed after being posted in prohibited locations. In support of its contention, it cites *Seton Co.*, 332 NLRB 979, 992 (2000), and cases cited therein, including *Opryland Hotel*, 323 NLRB 723 (1997), and *Eaton Corp.*, 302 NLRB 410, 413 (1991). The conduct of the employer in those cases, however, was far more egregious and public in its support of the antiunion employees, including openly permitting them to collect signatures and distribute literature during working time while simultaneously prohibiting and even punishing similar conduct by those who supported the union. In the present case, a third party, an employee, posted antiunion flyers at 6:30 in the morning at the public entrance of Respondent's facility, a location where undisputedly such flyers did not belong. About 1-1/2 hours later, at 8 a.m., Lopez immediately ordered the flyers removed when she first noticed them upon arriving at work, and they were promptly removed. Although it can be argued that Respondent may have been slow to react, and that Respondent's security department should have removed the flyers without first getting a directive from management, I see no parallel between the events here and those in the cases cited by the Union or other cases where employers have been found to have unlawfully or improperly assisted antiunion efforts. The offending flyers were promptly removed upon first being noticed by a high-ranking member of management, and were up for about 1-1/2 hours at most. I am not persuaded that Respondent's arguable slowness to react was tantamount to assisting the antiunion effort, and that such conduct was coercive. Likewise, I find no coercive impact or intent in Respondent returning the removed signs to Humphrey. The circumstances surrounding how that came about are not clear, but there is absolutely no evidence that any unit employee was aware of such return, and therefore there can be no coercive impact. Accordingly, I recommend that Objection 5 be overruled.

In support of Objection 6, the Union, in its brief, advanced the testimony of Lisa Villareal and Teresa Saltos. Villareal, a nurse who primarily worked in the surgical (post op) unit but floated in other units, testified that she saw a bag containing buttons with the logo "Union Free at MMC," which was the rallying cry of the antiunion employee group, pinned to the bulletin board in either the pediatric unit or the orthopedic unit (it's unclear which). Villareal testified, and is undisputed, that the bulletin boards were exclusively reserved for the use of MMC management, without whose permission nothing could be posted there.<sup>39</sup> Villareal testified that she saw these bags hanging from the bulletin board for about 1 or 2 weeks, between the end of May and beginning of June. Villareal additionally testified that she saw antiunion flyers, presumably by the same group, taped to the refrigerator in the breakroom of her own department, the surgical unit. According to Villareal, no postings of any type were allowed in the refrigerator door. Villareal added that she saw managers enter the breakroom where these flyers were posted but did not remove them. Finally, Villareal also saw antiunion flyers posted in employee bathrooms. (Tr. 571-574.) I found Villareal to be a credible witness, straightforward, and certain in her testimony, and with good recollection.

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<sup>39</sup> Sec. V (C) of Respondent's Solicitation/Distribution policy specifically states: "Literature may not be posted on bulletin boards without the prior approval of Human Resources or Administration. Any unauthorized literature will be removed from the bulletin boards." (R. Exh. 7.)

Salto testified that on multiple occasions she saw “lime green” antiunion flyers (green being the color associated with the antiunion employee group) “everywhere,” including posted in bulletin boards and bathrooms, as well as laying around in nurses’ (work) stations and break rooms. The green flyers would often stay posted for an entire shift and even several shifts, although sometimes the flyers would differ from one shift to the next, suggesting that they were being regularly re-posted. (Tr. 1278-1283.) Salto admitted, however, that she also saw “red” (prounion) flyers posted on bulletin boards, although these did not appear to stay posted as long. (Tr. 1284.) As discussed earlier, I found Salto to be a credible witness, and I credit her testimony.

Respondent offered the testimony of Cardiac Telemetry Department Nurse Manager Sandra Drumonde, the department where Salto works. Drumonde testified that on multiple occasions she saw both green antiunion and red protonion flyers posted on bathrooms walls, on cabinet doors in the break rooms, and on bulletin boards, locations where they were not permitted. She also saw a green flyer on a desk at a nurses’ station on only one occasion. Her practice was to remove both red and green flyers from these locations, whereas she left flyers placed on the tables in the break rooms, where they were permitted to be, undisturbed.<sup>40</sup> I found Drumonde to be a credible witness, certain in her testimony and unwavering in cross-examination, with a straightforward demeanor. I find, accordingly, that Drumonde applied the solicitation and distribution rules equally with regard to both sides. It is not clear if other supervisors did.

What emerges from the totality of the testimony and overall evidence is that a vigorous campaign was conducted by all sides, and that some employees for both sides were very passionate about their beliefs. Leaving out Respondent for the moment, who itself posted or distributed much campaign literature, it is clear that both the protonion (red) and antiunion (green) employees distributed and posted large amounts of literature. Although listening to the union witnesses alone would leave the impression that the antiunion “green” literature was more prevalent, there is no direct or persuasive evidence that Respondent was engaged in a systematic or widespread campaign to suppress protonion literature while assisting or aiding the antiunion group by permitting it to post or distribute its literature where others could not. Indeed, the prevalence of the “green” literature, to the extent that there was any, may have been due to the more aggressive efforts of that group, who may have been quicker to replace and re-post any literature removed by managers or others. In the final analysis, even though I have credited the testimony of Villareal and Salto, the evidence shows that the prevalence of antiunion literature, if indeed that was the case, was limited to two or perhaps three departments during a 2-week period among the two to three dozen departments involved in the election. I conclude that this occurrence was not attributable to Respondent or largely disseminated. I therefore find that this conduct did not affect the results of the election and will recommend that Objection 6 be overruled.<sup>41</sup>

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<sup>40</sup> I note that Respondent had instructed its supervisors and managers to enforce its solicitation/distributions rules equally against both sides, regardless of whether the violator was a protonion or antiunion. (R. Exh. 22, MMC 1288-1289.)

<sup>41</sup> As it did in support of Objection 5, the Union cites *Seton Co.*, *supra*, and other cases cited there. I find those cases inapposite for the same reasons discussed in my analysis of Objection 5.



In support of Objection 11, the Union offered the testimony of Lori Silva, a nurse who works in the Post-Anesthesia Care Unit (PACU). Silva testified that on June 23, the Monday before the election, she placed prounion flyers at the table in the PACU breakroom just before her shift started. Silva then started her shift and was attending to a patient in an area down the hallway from the breakroom, and she testified that anyone coming in or out of the breakroom would have had to walk down the hallway right past her. Shortly thereafter, Silva saw three individuals who she recognized as “administrative secretaries,” but whose names she does not know, walk past her and enter the PACU breakroom. When they emerged from the breakroom a couple of minutes later, Silva testified, they noticed Silva and other nurses staring at them, because their presence was unusual. Without prompting, these individuals then explained to those present, including Silva, that they were there to make sure the “election notices” has been posted. Silva was suspicious, so after the three individuals left she asked a nurse to watch her patient, and then she went into the breakroom to check if the union literature she had left was still there. It was not, and Silva checked the trash can in the breakroom but it was not there either. Silva testified that no one else could have taken the literature, since no one else could have entered or exited the breakroom without her noticing. (Tr. 69-75.) Silva admitted she did not actually see the three individuals take or carry out the union flyers. (Tr.135.)

I credit Silva’s testimony, and conclude it is reasonable to infer that these individuals removed the union flyers from the PACU breakroom on this occasion. Under the circumstances, it is also reasonable to infer, even if their names were not revealed, that these individuals were agents of Respondent. Nonetheless, this appears to be an isolated event, and there is absolutely no evidence of dissemination of this event in the bargaining unit. The Union cites *Jennie-O Foods*, 301 NLRB 305, 338 (1991), for the proposition that selective destruction and removal of only union literature violates Section 8(a)(1) of the Act and is objectionable conduct. In that case, however, the destruction of union literature occurred on a daily basis for months, was conducted by a high-ranking manager, and occurred while the employer had additionally promoted an unlawful no-solicitation/distribution policy prohibiting the distribution of union literature even in nonwork areas. None of those factors, or other equally compelling factors, are present here. In light of the fact that this was (1) an isolated incident; (2) of slight severity; and (3) not disseminated among the bargaining unit, and considering that the results of the election were not close, I find that this incident is de minimis and not likely to have affected the results of the election. *Cambridge Tool & Mfg.* supra; *Avis Rent-A-Car System*, supra. Accordingly, I recommend that Objection 11 be overruled.

#### Objection 7

7. Respondent, through its supervisors and/or agents, restrained and coerced employees, interfered with laboratory conditions and made a free election impossible by coercively interrogating employees about their views and/or contact with the Union.

In support of this objection, the Union offered the testimony of nurse Rhonda Sanford, who works in the Post-Partum department, also known as the Family Birthing Center. Sanford testified that about 1 week before the election she was approached by Thelma Camarillo, her department manager, on a hallway at the hospital. Camarillo initially asked Sanford how her

husband, who had been ill, was doing, and Sanford replied that he was doing okay. According to Sanford, Camarillo then told her that if the Union came in, “she would not be able to talk to me without someone else there,” that they would not be able to have these conversations. Camarillo then asked why Sanford would be for the Union, and Sanford replied that she did not feel secure and felt she never got recognition. Camarillo then asked Sanford not to vote for the Union. (Tr. 447-448, 468, 473.)<sup>42</sup>

Camarillo had a different version of this event. She testified that she asked Sanford about her husband, and that Sanford said he was still not doing well. At this point the conversation was ending, and as they began to walk away from each other, Camarillo told Sanford to please not forget to vote (in the upcoming election). According to Camarillo, Sanford replied that she planned to vote, and then added that her father was antiunion and that there was no way she was going to vote for the Union. Camarillo testified that she told Sanford to do what she thought best for her and her family. (Tr. 1866-1868.) Sanford was recalled as a witness in rebuttal, and adamantly denied that she had said anything about her father to Camarillo, adding that her father had been dead for 10-12 years. She also denied that she said that she was going to vote against the Union, that she did not say anything about how she was going to vote. She explained that she had mentioned her father to Camarillo in another conversation about a year earlier, and at that time had said she had not supported the Union in an earlier campaign years before. (Tr. 2065-2066, 2077-2079.)

I found Sanford to be a more credible witness and credit her version of the conversation. First, I note that Camarillo’s version is not very plausible. I find that it is highly unlikely that Sanford would have volunteered that she was against the Union when in fact she had become associated with the union campaign, as shown in union newsletters with her photo in them (Tr. 2094; P. Exh. 56). Indeed, that would explain the basis for Camarillo asking Sanford why she supported the Union. Moreover, Camarillo admitted, as did Betty Lopez, that Respondent had asked its managers to approach nurses to start conversations about unions, as reflected in Respondent’s internal documents (Tr. 1658, 1870; R. Exh 22).<sup>43</sup> I therefore conclude that Camarillo initiated the conversation about the Union with Sanford, and find that the conversation occurred as Sanford described it.

The Union cites cases that establish that the type of interrogation that occurred here violates Section 8(a)(1) of the Act and should therefore be considered objectionable conduct. I agree that the above-described interrogation was likely in violation of Section 8(a)(1), but there is no complaint alleging such in this case. Rather, as discussed above, this is an objections case, and the standard to be applied is as set forth in *Cambridge Tool & Mfg.*, supra, viz., whether the misconduct, taken as a whole, warrants a new election because it has “the tendency to interfere with employees’ freedom of choice” and “could well have affected the outcome of the election.”

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<sup>42</sup> During the initial phase of her testimony on direct examination, Sanford did not mention that Camarillo had asked her why she was for the Union. (Tr. 447-448.) After her testimony concluded, she came back to the hearing room about 30 seconds after she had departed, and her attorney announced that Sanford had informed him she had forgotten to testify about something else Camarillo had said to her. I allowed the additional testimony, over Respondent’s objections, and allowed Respondent to further cross-examine Sanford on the additional testimony (Tr. 468-473, 2069).

<sup>43</sup> This memorandum, entitled “How to Start Conversations about the Union,” instructs managers, inter alia, to say things like “I want you to know I don’t want to see a union get in here.” (R. Exh. 22.)

In light of the fact that this interrogation only involved one employee in a large bargaining unit of several hundred, that there is no evidence that word of this misconduct was disseminated, and that the outcome of the election was not close, I conclude that it could not have reasonably affected the outcome of the election.

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Accordingly, I recommend that Objection 7 be overruled.

#### Objection 8

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8. Respondent, through its supervisors and/or agents, restrained and coerced employees, interfered with laboratory conditions and made a free election impossible by imposing more onerous working conditions during the critical period.

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In support of Objection 8, the Union asserts that Respondent, during the critical period, restricted the nurses' use of cell phones in the surgical department in a manner that was inconsistent with past practice. Respondent's cell phone policy in essence not only prohibits employees from using cell phones during working time, except in emergencies, but prohibits employees from having the cell phones on their person, directing employees to keep cell phones on their purses, backpacks, or lockers. (P. Exh. 13, p. 3-4.) The Union offered the testimony of Crystal Hanchett, who works in the pre-admission department, which is part of the surgical unit. Hanchett testified that when Jo Ann Adkins became the manager of the surgical unit department in 2013, she relaxed the cell phone rules in her department, allowing nurses to carry cell phones on their person—although their use in work areas, particularly around patient, was still prohibited. According to Hanchett, Adkins explained that they were all “adults,” and could keep cell phones in their pockets in case, for example, their children needed to text them when they got home for school or other similar circumstances. (Tr. 376-379; 408-409.) Hanchett further testified that in the period between the filing of the petition and the election, the cell phone policy in her department became much stricter, reverting back to the policy prohibiting nurses from having cell phones on their person. This change of policy, according to Hanchett, was announced at a staff meeting around the end of May where Adkins and Assistant Department Manager Kathy Tuck were present. I note, however, that Hanchett never identified the person who announced the policy change or state exactly what was said in this respect. (Tr. 380.) While I found Silva to be generally credible, I believe that she may have misunderstood what was said about the policy, for the reasons described below.

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Adkins testified, but was not asked about the cell phone policy. Tuck testified, and denied that there had been any change regarding the cell phone policy during the critical period.<sup>44</sup> Tuck explained that several charge nurses had complained to her that the “relaxed” policy was being abused (which she described as cell phone “creep”), with some nurses actually using their cell phones in work or patient care areas. Consequently, at several meetings she felt she had to reminded nurses about the policy, namely no *use* of phones in work areas. (Tr. 1703-1708; R. Exh. 25.)

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<sup>44</sup> Neither Adkins nor Tuck denied that Adkins had relaxed the cell phone policy in her department in 2013, permitting nurses to carry the phones on their person.

I found Tuck to be a credible witness, and there is evidence that corroborates her version of events. For example, the minutes of the meeting in late May where the cell phone policy was discussed indicate that nurses were reminded that cell phones should be used during breaks and lunchtime, and states, “[D]o not have cell phones *out and visible* in the Department.” (R. Exh 25 p. 6, emphasis added.) This clearly suggests that nurses were still permitted to have their phones with them, albeit in their pockets, consistent with Adkins’ rules. Additionally, I note that Tuck’s testimony about complaints regarding cell policy abuse was corroborated by *union* witness Lori Silva, who testified that she complained to Tuck about fellow charge nurse using her cell phone at the nurses’ station. Indeed, Silva testified that the policy was not changed at the May meeting. (Tr. 55.) Moreover, I note that despite dozens of nurses working in Hanchett’s department, many who attended the meeting in late May, not a single witness corroborated the allegation that the cell phone policy changed during the critical period. I would add that there is no evidence that any individual was warned, let alone disciplined, for violating this allegedly changed policy.

In light of the above, I find that the evidence is plainly insufficient to show that there was a cell phone policy change during the critical period, and conclude the Union has failed to meet its burden in that regard. Accordingly, I recommend that Objection 8 be overruled.

#### Objections 9 and 10

9. Respondent, through its supervisors and/or agents, restrained and coerced employees, interfered with laboratory conditions and made a free election impossible by engaging in surveillance of employees.

10. Respondent, through its supervisors and/or agents, restrained and coerced employees, interfered with laboratory conditions and made a free election impossible by creating an impression of surveillance of employees.

The above-two objections are grouped together because they are closely related. In support of these objections, the Union offered testimony on three separate examples or instances where Respondent allegedly engaged in surveillance of union activity, or at least created the impression of such surveillance. Regarding the first, then union organizer (currently agent) Alyssa Kang testified that on or about May 24, like on many prior occasions, the Union was conducting “tabling” on public property at one of the main entrances to MMC.<sup>45</sup> According to Kang, along with her, union representatives or organizers Joe Schuman, Jenn Dean, Brant Horacek, and Mariana Zapata were present at the Union’s table on that date. Sometime starting around 11:15 a.m., Kang noticed a female security guard standing about 30 feet away who appeared to be paying attention to the Union’s tabling, and at times was holding a hand to her ear

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<sup>45</sup> A previously described, “tabling” is the term used by the Union to describe the setting up of a table with literature, as well as occasionally food and beverages, which it distributed to MMC employees that came by. Kang testified that the tabling had started in early 2012, when the Union first started to organize Respondent’s employees, and had been carried out on a daily basis since February 2014, when the union organizing activity was “ramped” up. Tabling was typically conducted from 11:30 a.m. to 2 p.m. and from 10 p.m. to 1 a.m., to coincide when employees were on break. (Tr. 960-963.) Typically, the Union kept a signup sheet for employees that were interested could provide their address and contact information. A signup sheet for May 24 was introduced, showing one name, Rhonda Sanford, with all other names blacked out (Tr. 964-966; P. Exh. 29). The significance of this will be discussed below.

as if she had an earpiece, and moving her lips as if talking to someone. The guard stayed in the area until about noon, and then went to the emergency room (ER), the entrance to which was nearby, and came out with a second female 10 minutes later. Both guards stayed in the same area, across the driveway from where the tabling was conducted, for the rest of the “tabling” time. A photograph of the guard was taken by Schuman and introduced as Petitioner’s Exhibit 29. Kang admitted she could not actually see an earpiece in the guard’s ear, nor hear what she was saying. (Tr. 963-973, 1004-1010; P. Exh 30.) Later, during cross-examination, a blueprint depicting Respondent’s property was introduced as Respondent’s Exhibit 4, and Kang marked a spot with a circle and arrow on the left side of the exhibit to show the area where the Union had its table, and marked with an “X” the spot where she observed the guard standing. The blueprint shows there are two driveways and a middle island between the spot where the union table was and the spot where the guard stood (Tr. 1031-1048; R. Exh. 4).

Neither of the two security guards described by Kang testified. Respondent offered the testimony of Jennifer Heckathon, Respondent’s public safety supervisor, in essence the head of Respondent’s security department. Heckathon testified she took a series of photographs of the area depicted in the blueprint earlier introduced as Respondent’s Exhibit 4. The photographs Heckathon took were introduced as Respondents Exhibits 28(a) through (d). The first of the photographs, marked as exhibit 28(a), shows an elevated perspective of the area where the union table was set up and where the guard was standing, and appears to be the best method by which to gage the distances involved. There were many objections during Heckathon’s testimony when she tried to estimate distances, but the essence of her testimony was that the location where Kang placed the guard(s), was far greater than the 20-30 feet she testified to.<sup>46</sup> She also testified that guards are not assigned to stand in any given spots, but are directed to move around.

The Union’s arguments in support of its contention that the above-described incident constituted coercive surveillance, or the impression of such, are at best circumstantial and weak. There is no evidence that the guard(s) in question took photographs or made recordings, no evidence that the guard(s) were in a location where they were not supposed to be, and only speculative evidence as to whether the guard was actually reporting the activities observed, since Kang could not hear what, if anything, the guard was saying. Secondly, it simply makes no sense for Respondent to have engaged in surveillance on this particular day, in light of the circumstances. The Union, by its own admission, had been tabling for over 2 years, and on a daily basis for the past 3-4 months. There is no evidence that anything important or special was occurring on May 24, which was just like any other ordinary day among the hundreds of occasions when the Union had conducted tabling. It is not credible or sensible that Respondent would embark on a seemingly fruitless surveillance mission for no apparent reason on this one particular day, a mission that would gain it absolutely nothing. A more likely explanation is that

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<sup>46</sup> The photograph admitted as R. Exh. 28(a), when compared to R. Exh. 4, shows that the area where the Union had its table set up was to the right and behind the stop sign (by the white truck) in the middle/right side of the photograph. The spot where the guard was standing was placed (by Kang) across two driveways and a middle island, on the opposite sidewalk where the shadow of two small shrubs appear, with the spot marked somewhere between the two small shadows. Each of the two driveways appears to be about 15-feet wide, and the island between them containing greenery is about half that width. I believe this photograph shows that the guard was standing diagonally across the two driveways and the island between them from the union table, at a distance that appears to be significantly greater than the 20 to 30 feet Kang estimated in her testimony.

a security guard, out of curiosity or zeal, got a little carried away and hovered in a nearby area a little too long for the Union's comfort.

Finally, even assuming that this activity was in fact surveillance, the issue is whether this isolated incident "could well have affected the outcome of the election," as set forth in *Cambridge Tool & Mfg.*, supra. Among the factors set forth in *Cambridge Tool* to determine whether an election should be set aside are: the number of incidents of misconduct; the severity of the incidents, whether the conduct was likely to cause fear among employees, the number of employees subjected to the misconduct; the degree of persistence of the misconduct in the mind of employees; the extent of dissemination of the alleged misconduct; and the closeness of the final vote. In this regard, I note that there is absolutely no evidence of dissemination of this incident, or evidence that those employees who might have been subjected to the surveillance actually noticed, let alone that it persisted in their minds. Indeed, no employee testified that they witnessed this incident, and the one employee whom the Union claimed was subjected to it, Rhonda Sanford, testified but said nothing about this incident. Accordingly, I find that an inference exists that Sanford did not even notice that "surveillance" was occurring on the day in question. Considering the additional fact that the bargaining unit encompasses about 900 employees, and that the margin of the vote was not close, I conclude this incident could not have had an effect on the outcome of the election.

The second incident, or set of incidents, that the Union asserts constituted surveillance, or creating the impression of such, involves Nurse Lori Silva and a series of encounters she allegedly had with the manager of her department (surgical services), Jo Ann Adkins. Silva testified that when she comes to work in the morning, she changes to her "scrubs" (hospital gown) in the OR lounge, where nurses had lockers, before proceeding to her duties in the recovery unit (PACU). Likewise, she changes back to her "street" clothing at the end of her shift in the same lounge. She occasionally conversed with other off-duty nurses in this lounge about the Union and other job-related matters. According to Silva, to enter or exit the lounge, nurses have to walk by Adkins' office. Silva testified that during the critical period it appeared that Adkins was coming into the lounge to use the restroom more frequently and staying longer than usual, i.e., "hanging around," or loitering, which inhibited her from talking to other nurses about the Union.<sup>47</sup> (Tr. 65-67.) Silva admitted, however, that this restroom is the one nearest Adkins' office, and that it was not unusual to see Adkins in the lounge. She also admitted that she spoke to other nurses about the Union and distributed union literature when Adkins was not present. (Tr. 110-119.)

Adkins testified that the bathroom adjacent to the OR lounge is the one nearest to her office and the one she uses most of the time. She denied going to the lounge or restroom more often or during any specific times during the critical period, and also denied listening on conversations of the nurses, or following Silva or anyone else there during the critical period. Indeed, Adkins did not recall seeing Silva in the lounge during this time period, although she did recall seeing Silva in the hallway near her office. She testified she did not know what hours or shift Silva works. Adkins also testified that she would always say hello to the nurses she saw in

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<sup>47</sup> Silva defined "hanging around" as follows: "Kind of hanging around. She'd come in and say hi. I mean my locker was right close to the doors and the restroom. So she'd come in, recognize me, say hi, use the ladies restroom and might say hi to a couple of other people and then leave." (Tr. 67.)

the lounge or by the restroom and would occasionally engage them in short “chit-chat.”  
(Tr. 1435-1440, 1448-1449.)

5 I credit Adkins’ testimony that she was not going to the OR lounge more often during the  
critical period and that she was not following Silva or attempting to listen to anyone’s  
conversation in the OR lounge. Moreover, Adkins provided a valid and convincing reason for  
her presence in the lounge, which she had to traverse in order use the restroom, as Silva  
conceded. While I do not discredit Silva, whom I believe sincerely felt Adkins might be  
10 snooping around, I conclude that under a reasonable objective standard, Adkins cannot be  
considered to have engaged in surveillance or in creating the impression of surveillance. Indeed,  
Silva’s own description of what she meant by Adkins’ “hanging around” the lounge hardly  
supports the conclusion that Adkins was loitering there, but rather confirms Adkins’ testimony  
that she was engaging in short conversations with the staff on her way to or from the restroom.  
Accordingly, I find no merit in the allegation that Adkins engaged in surveillance or in creating  
15 the impression of surveillance.

The last allegation of surveillance by Respondent involves the alleged conduct of  
Carlo Jimenez, department manager of renal telemetry and dialysis unit. Nurse Melanie  
Thompson testified that on the evening of Saturday, June 21, while off duty, she and fellow  
20 Nurse Sharon Waite were “rounding” in the fifth floor, in the renal telemetry department.  
Thompson and Waite were union supporters who were rounding through different departments at  
MMC that evening in order to speak to other nurses during their breaks about supporting the  
Union. Around 10:45 or 11 p.m., Thompson testified that she and Waite were at the nurses’  
station at renal telemetry speaking to some nurses, although not about the Union, when Jimenez  
25 approached. Thompson and Waite exchanged greetings with Jimenez, who proceeded to stay at  
the nurses’ station. According to Thompson, the nurses who were speaking to them quieted  
down in Jimenez’ presence, so she told the nurses they were going to go the breakroom, to come  
and join them. Thompson and Waite waited about 15 minutes in the breakroom, but to their  
surprise no nurses came by.<sup>48</sup> (Tr. 728-730.) Thompson and Waite then took the elevator to the  
30 fourth floor to visit with the nurses there, and proceeded to the breakroom on that unit. When  
they arrived there, they found Jimenez sitting in an alcove directly in front of the breakroom  
door. Thompson testified that she and Waite were in the breakroom for 15 minutes, and during  
the entire time, Jimenez sat in a chair a few feet away facing the door to the breakroom.  
Thompson again testified that no nurses came by while they were at the breakroom, which was  
35 highly unusual (Tr. 731-734, 838-859). Waite also testified about this incident, and her  
testimony is almost identical to and corroborates Thompson’s testimony. (Tr. 636-641, 654-657,  
661-663.)<sup>49</sup>

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<sup>48</sup> Thompson testified that in her experience in prior roundings, nurses always came to the breakroom to speak with her to speak about the Union and ask her questions about the campaign (Tr. 729-730).

<sup>49</sup> A photograph taken by Thompson of the area where Jimenez was sitting, on a chair facing the entrance to the fourth floor telemetry breakroom, was introduced as P. Exh. 24. Thompson, whose reflection can be seen on the photograph, took the picture a few days before the trial. A dark blue chair that partly appears on the left side of the picture was placed there by Thompson to show the exact location where Jimenez was sitting on June 21, facing the door of the breakroom, which partly appears on the far right side of the photo. (Tr. 816-819, 1835-1836; R. Exh. 24.)

Jimenez testified that as department manager of renal telemetry and dialysis, he typically works about 1 or 2 weekends a month, usually between 4 and 11 p.m., and was working on the evening of June 21. He remembers running into Thompson and Waite at the nurses' station on the fifth floor that evening, the floor where his office is located, but did not recall why he was at the nurses' station, although he stated that was part of his routine. He did not recall Thompson and Waite leaving the nurses' station at some point, and did not recall if the nurses were talking to Thompson and Waite when he arrived. Jimenez testified that he was at the nurses' station for about 3 minutes and then headed down the stairs to the fourth floor unit, where he rounded throughout the floor. He ended up at what he described as the physicians charting area, which is like a small cove about 10 feet from the entrance of the fourth floor breakroom. There are two computer terminals in this area, where Jimenez testified that he sat and had a conversation with a nurse named Myrna Dirige.<sup>50</sup> Jimenez further testified that he did not recall seeing Thompson and Waite enter or exit the fourth floor breakroom; indeed, he did not recall seeing them anywhere on the fourth floor. He recalls seeing them at the parking lot later as they were leaving. (Tr. 1830-1839, 1847-1848.)

I credit the testimony of Thompson and Waite, who not only corroborated each other's testimony, but had far more detailed recollection of this event than Jimenez, whose recollection was not as clear. In light of this credibility resolution, I conclude that while the encounter between Jimenez and Thompson and Waite on the fifth floor nurses' station was coincidental, his conduct on the fourth floor amounted to surveillance. In making this finding, I specifically credit the testimony of Thompson and Waite that Jimenez sat on a chair a short distance from and directly facing the breakroom on the fourth floor where they were, with his back turned to the nurse who he was ostensibly speaking with.<sup>51</sup> Jimenez admitted during cross-examination that he knew Thompson and Waite, who were off duty and did not work in his department, were union activists (Tr. 1855-1856). It is therefore reasonable to conclude he knew they were in *his* department, late at night, to solicit support for the Union. In light of these circumstances, I conclude that Jimenez sat on a chair facing the breakroom to send a message to Thompson and Waite (and any nurses that may have wanted to visit with them) that he was watching them.

Without a doubt, Jimenez' conduct was coercive, and would violate of Section 8(a)(1) of the Act, as the Union correctly points out, except there is no complaint in this case alleging such violation. The issue instead is whether this conduct was objectionable and warrants setting aside the results of the election. The criteria set forth in *Cambridge Tool & Mfg.*, *supra*, must therefore be applied. While I note that this conduct is inherently coercive, and that it occurred on June 21, only 5 days before the election, I also note that: (1) this appears to be the only incident of true surveillance that has been established; (2) there appears to be only two or three employees that witnessed this incident, including Thompson and Waite, whose prounion views were unlikely to be affected; (3) there is *no* evidence of dissemination; (4) there is no evidence of the persistence of the misconduct in the mind of employees; and (5) the results of the election were not close.

<sup>50</sup> Respondent, through Jimenez, introduced several photographs of the area near the breakroom where he was sitting, which he described as the charting area. R. Exh. 26 shows the computer terminals where Jimenez stated he was sitting, and R. Exh. 27 shows the view looking left from the computer terminals, and showing the door of the breakroom (Tr. 1836, 1840-1843, 1845-1847; R. Exhs. 26, 27).

<sup>51</sup> Thus, I find that Jimenez was sitting in the location of the chair depicted in the photo in P. Exh. 24. With the added perspective of the photos introduced as R. Exhs. 26 & 27, it is clear that while Jimenez was in the chair facing the door of the breakroom, Nurse Dirige would have been behind and to the right of Jimenez.



Taking all these factors into consideration, I conclude that Jimenez' misconduct was unlikely to have affected the results of the election. Accordingly, and for the above reasons, I recommend that Objections 9 and 10 be overruled.

#### Objection 14

14. Respondent, through its supervisors and/or agents, restrained and coerced employees, interfered with laboratory conditions and made a free election impossible by continuing the taint of the conduct found unlawful in Case 32-CA-098873 by failing and refusing to comply with the Board's Order throughout the critical period, and engaging in further instances of the very conduct which the Board found unlawful in that case.

This objection tracks the issue discussed in the first part of this decision, namely the posting of the "side notice" by Respondent, which I have found resulted in noncompliance with the Board-ordered remedy. The Union asserts that such noncompliance is objectionable conduct that taints the results of the election. It should be noted, as reflected in the stipulation of facts entered into by the parties in Case 32-CA-098873, that the side notice was posted during the same time period and in the same locations (36 locations), as the Board notice. The side notice was thus posted for a 60-day period along with the Board notice, commencing on or about January 27-28, 2014, and ending on or about March 30, 2014. The side notice was accordingly not posted during the critical period, which commenced on May 16 and ended June 27, so at issue is whether the "taint" of such conduct permeated through to the critical period and affected the results of the election.

As the above facts reflect, the side notice came down, along with the Board notices, a little over 6 weeks prior to the commencement of the critical period. Nurse Melanie Thompson, whose testimony regarding some of Respondent's employees' reaction to the side notice was quoted in the first part of this decision, testified about the dismay caused by the side notice (see, e.g., Tr. 701, 770). Thompson acknowledged, however, that by the end of March the conversation among employees about the side notice had ceased, only to be replaced by conversation regarding a *new* Board notice that had been posted pursuant to a settlement agreement in Cases 32-CA-110245 and 32-CA-114382, as well as other topics. (Tr. 775-776; P. Exhs. 20(a) & (b).)<sup>52</sup>

The issue as to whether the failure to properly comply with the posting of a Board notice prior to the critical period can be the basis for objectionable conduct appears to be a novel one, and I have not found direct authority on this issue, nor have the parties been able to cite any. Generally, however, prepetition conduct cannot be the basis for setting aside an election, *Ideal Electric & Mfg. Co.*, 134 NLRB 1275 (1961), unless the conduct is serious or egregious. *Servomation of Columbus*, 219 NLRB 504, 506 (1975).

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<sup>52</sup> The new settlement agreement contained a nonadmissions clause, and was apparently posted between the end of February/early March until the end of April and early May (P. Exhs. 20, 21). There is no allegation or evidence that Respondent posted a side notice next to this new notice which was posted pursuant to the settlement agreement.

I note that no new unfair labor practice was alleged in connection with Respondent's posting of the side notice, and thus it is compliance matter addressed in the first part of this decision with regard to the compliance specification. Additionally, again using the criteria set forth in *Cambridge Tool*, supra, there is no evidence of dissemination during the critical period, or evidence that the posting of the side notice persisted in the employees' minds or caused fear among them. Additionally, I find that this conduct is not the type of serious or egregious prepetition conduct, such as threats of violence, which would serve as the basis for overturning an election.

Accordingly, I recommend that Objection 14 be overruled.

#### Objections 16, 17, 18, and 21

16. Respondent, through its supervisors and/or agents, restrained and coerced employees, interfered with laboratory conditions and made a free election impossible by communicating to employees that it would be futile to select the Union as their collective-bargaining representative.

17. Respondent, through its supervisors and/or agents, restrained and coerced employees, interfered with laboratory conditions and made a free election impossible by threatening that no raises would be paid throughout the period of contract negotiations with the Union, if the employees voted for the Union.

18. Respondent, through its supervisors and/or agents, restrained and coerced employees, interfered with laboratory conditions and made a free election impossible by explicitly and implicitly threatening RNs with more onerous working conditions if they voted for the Union.

21. Respondent, through its supervisors and/or agents, restrained and coerced employees, interfered with laboratory conditions and made a free election impossible by threatening the loss of benefits if employees voted for the Union.

I have grouped the above-four objections together because they are closely related and the evidence offered in their support is interconnected. Indeed most, if not all, of the evidence offered in support of these objections relates to conduct that allegedly occurred in mandatory group meetings held by Respondent, or which was disseminated in a video (DVD) distributed by Respondent to unit employees.

#### *A. The Mandatory Group Meetings*

The Union asserts that statements made by Respondent's managers and agents, including campaign consultants that were retained by Respondent to conduct its campaign against the Union, were coercive and tainted the laboratory conditions required during the critical period. It is undisputed that Respondent in early June held numerous mandatory meeting of unit employees during which either managers and/or campaign consultants spoke about the upcoming election. At the hearing, the Union offered, as Petitioner's Exhibit 55 (P. Exh. 55), a summary it had

prepared detailing the number of meetings held by Respondent during the critical period, and I reserved a ruling on its admissibility because it was uncertain if the summary, prepared based on employee sign-in sheets provided by Respondent under subpoena, was accurate. I am now satisfied that the summary is accurate, and thus admit Petitioner's Exhibit 55 into evidence.<sup>53</sup>

The first meeting in which the Union alleges objectionable conduct occurred was not a meeting called for the purpose of discussing the campaign, as other meetings discussed below were, but was actually a regularly scheduled staff meeting that took place on May 21. On that day, Jo Ann Adkins, the manager of surgical services (whose testimony as to other matters has been previously discussed), held meetings in two of her departments, Same Day Surgery (SDS), and Post Anesthesia Care Unit (PACU). Typically, work-related issues are discussed in these staff meetings, which are usually videotaped so that nurses who could not attend can later watch and learn what was discussed at the meeting.

Nurse Lori Silva testified that on May 21, she attended the SDS meeting where Adkins, among others including Managers Jon Felton and Kathy Tuck, spoke.<sup>54</sup> According to Silva, at some point during the meeting, which lasted a couple of hours, Adkins spoke about the situation at Sutter Tracy.<sup>55</sup> Silva testified Adkins stated that the Union had made a bunch of promises it could not keep, that the nurses there had gone for almost 2-1/2 years without a raise during contract negotiations (Tr. 55-58). Silva also stated that nurses had later come to her asking whether it was in fact true that the nurses at Tracy Sutter had not received raises, and Silva informed them it was not true. (Tr. 154, 158-159.) Nurse Crystal Hanchett testified that she was present at the same meeting on May 21, and that Adkins had said that the wages at Sutter Tracy had been frozen for 2-1/2 years during contract negotiations. Hanchett added that this caused some concern, especially among the younger nurses. (Tr. 380-382.)

Adkins testified that she spoke about the election for about 5 minutes in a meeting that lasted over an hour, but was not specifically asked whether she spoke about Sutter Tracy.

The Union alleges that by mentioning the alleged wage freeze at Sutter Tracy, Adkins was coercively suggesting that the same thing would happen if the employees voted for the Union at MMC, and that it was therefore futile to support the Union.

As discussed above, these staff meetings were videotaped, and indeed a copy of the videotaped SDS meeting on May 21 was admitted as Petitioner's Exhibit 17 (P. Exh. 17). I have

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<sup>53</sup> My ruling is based on additional evidence and arguments submitted as an attachment to its post-hearing brief, and provided to Respondent, which persuades me that the summary is accurate. I note, however, that even if the summary is slightly inaccurate, such inaccuracy is ultimately of little significance, because what truly matters is that the evidence shows that numerous mandatory meetings were held which were attended by a significant number of unit employees. Ultimately, it does not matter if the number of meetings held was 84, 67, or 39; what matters is what was said during the course of those meetings.

<sup>54</sup> This is the same meeting where there was discussion about cell phone policy, previously discussed under Objection 8, as well as the meeting where Adkins spoke about where it was permissible, and not permissible, to distribute pro or antiunion literature.

<sup>55</sup> As discussed in the "Background" section earlier in the decision, Sutter Tracy is a Sutter-operated sister facility about 30 miles from MMC. The Union was certified as collective-bargaining representative of the nurses in that facility in early 2012, and there has been no collective-bargaining agreement reached after almost 3 years of unsuccessful negotiations, with unit employee wages allegedly being frozen in the meantime.

watched the video of this meeting, and some of the dialogue is difficult to understand or follow. The Union, however, provided a transcription of the video as an attachment to its post-hearing brief. The portion of the dialogue regarding this incident is fairly clear, and I accept the transcription of this portion of the meeting as being accurate. The video, and its transcript, show that while Silva, Hanchett, and Adkins were all truthful regarding their recollections of this event, their recollections were incomplete.

The video and transcript show, for example, that well into the meeting Adkins announced that the Union had filed a petition with the Board, and stated that an election would be held at a date yet to be determined, adding that every vote counted and that it was important that everyone vote. Adkins then added that in her experience Unions did not always tell the truth, that they could not always deliver on their promises regarding raises. She then states:

. . . . And the other part of it is, just because the union requests something doesn't mean the institution, whatever, the institution can and/or will agree to it. As you may not know, or may know, Tracy is two and a half years into negotiations. In that two and a half years they are not anywhere near close to reaching a settlement of an agreement and in that time all salaries have been frozen. Okay? . . .

The above statement, particularly the first part, appears to correctly state what employers can lawfully do in the course of bargaining (presumably in good faith), which is that they need not agree to anything the union demands or proposes. The second part of the statement provides an example that many MMC employees were apparently familiar with, Sutter Tracy, where the parties had been locked in unfruitful negotiations for over 2 years. The Board has held that employers are allowed to remind employees that union representation is no guarantee of better wages or benefits and that indeed collective bargaining can result in worse wages and benefits. *Mediplex of Connecticut, Inc.*, 319 NLRB 281 (1995); *City Market, Inc.*, 340 NLRB 1260, 1272-1274 (2003).

Accordingly, I find that Adkins' statements during the May 21 meeting, particularly in the absence of threats or other coercive statements at the time, does not constitute objectionable conduct.

As mentioned above, however, Respondent held numerous mandatory meetings during the first 2 weeks of June, during which the sole topic discussed was the campaign and upcoming election.<sup>56</sup> The Union asserts that Respondent engaged in objectionable conduct in many of these meetings by implying that voting for the Union would be futile, or result in more onerous working conditions, or result in a wage and benefits freeze, or result in loss of benefits.

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<sup>56</sup> HR Director Paula Rafala admitted that Respondent also held a series of non mandatory employee meetings in the days before the election (Tr. 1207-1209).

Lisa Villareal testified that she attended a mandatory meeting during which a man who she did not know, and whose name she did not recall, had given a presentation.<sup>57</sup> According to Villareal, the man said that if the Union came in, nurses would not be able to get raises during negotiations, and that negotiations could take a long time.<sup>58</sup> The man also stated that the “pie” is only so big, and it only had so many pieces, and that sometimes ancillary staff is laid off.<sup>59</sup> Additionally, Villareal testified that the presenter stated that if the Union came in there would no longer be an open-door policy with the managers, and that the nurses might have to go on strike. (Tr. 578-579, 600-601.) I found Villareal to be a credible witness, unhesitant, and straightforward in her testimony and demeanor, and I credit her testimony, which as described below is essentially corroborated by other witnesses.

Teresa Saltos testified that she attended a mandatory meeting where Pat O’Mara, one of the campaign consultants retained by Respondent, was the presenter. According to Saltos, O’Mara stated that he was there to provide education about the National Labor Relations Act. He stated that hospitals have limited resources, that the “pie” is only so big, and if employees got a union, the pieces of the pie would shrink correspondingly, adding that he had seen ancillary staff in other hospitals reduced after a union came in. Saltos testified that O’Mara repeatedly stressed the fact that in his experience, it was “very common” for ancillary staff to be reduced as a result of unions coming in. (Tr. 1286, 1327-1330.) As previously discussed, I found Saltos to be a credible witness, and her testimony in this regard was no different. Accordingly, I credit her testimony.

Melanie Thompson testified that she attended a mandatory meeting in early June where O’Mara was the presenter.<sup>60</sup> According to Thompson, O’Mara was speaking about benefits and compensation and stated that there was only so much pie, and that one slice of that pie represented nurses’ wages and benefits. O’Mara added that if the nurses wanted more, it would have to come from elsewhere, because there was only so much pie, so nurses would have to lose something. Thompson added that after this meeting, various nurses spoke with her about their concern that they would lose CNAs (the ancillary staff), because there was only so much “pie.” Indeed, Thompson also testified that even ancillary staff (CNAs) that had heard what was being discussed at the nurses’ mandatory meetings, expressed their concerns that they could lose their jobs if the nurses’ wages were raised. (Tr. 709-711, 787-795.) I found Thompson to be a credible witness, with good recollection of events, and consistent throughout her testimony, and thus credit her testimony.

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<sup>57</sup> It is undisputed that Respondent retained the services of several campaign consultants who presided over some of the mandatory meetings. HR Director Rafala testified that among these were Carina Hunt, Pat O’Mara, “Eddie” (last name unknown), “Jessica” (last name unknown), and “Nora” or “Norma” (last name unknown). (Tr. 1497.)

<sup>58</sup> It should be noted, as reflected below in the final footnote where I correct the transcript, that in the original transcript Villareal states that the speaker said that the nurses can get raises while negotiations are ongoing. (Tr. 579, line 19) This is incorrect; Villareal testified the speaker said that the nurses can’t get raises during negotiations. This is confirmed not only by my recollection as well as notes, but by her testimony during cross-examination.

<sup>59</sup> As was clarified by Villareal as well as other witnesses, the “pie” was an analogy, or metaphor, used by the presenters to symbolize Respondent’s operating budget. (Tr. 600, 1328.) As will be discussed below, the reference to ancillary staff being laid off, as testified by other witnesses, involved certified nurse assistants (CNAs) possibly being laid off to offset any gains achieved in collective bargaining.

<sup>60</sup> Both Saltos and Thompson testified that O’Mara used a Power Point presentation during the meeting. Thompson testified that she attended another meeting later in June, but gave no details.

Crystal Hanchett testified that a couple of weeks prior to the election she attended at mandatory meeting where Tim Noakes, Respondent's CFO, introduced a consultant named "Eddie" (last name unknown), who was accompanied by two women, whose names Hanchett does not recall. According to Hanchett, Eddie was the presenter, and stated, in response to questions about the events at Sutter Tracy, that the reason that negotiations were taking so long there is because the Union was dragging it out. Eddie then added that the nurses at Sutter Tracy could not get any raises as long as there was no contract because the "status quo" had to be maintained, while pointing at a page from the a booklet that had been distributed.<sup>61</sup> (Tr. 397-401.) Hanchett, during cross-examination, acknowledged that Eddie had used a Power Point presentation during the meeting, although she admitted that she had not paid close attention to the slides because she was focusing on what Eddie was saying. She also testified that Eddie said that even if Respondent bargains in good faith with the Union, the result could be that employees could do the same, better, or worse. (Tr. 421-424.)

Neither O'Mara, Hunt, Eddie, nor any of the other consultants or presenters at the mandatory meetings testified. David Cuesta, director of labor relations for Respondent's parent organization in Sacramento, testified that he attended eight meetings of employees during the first week of June.<sup>62</sup> Cuesta testified that at these meetings an official of MMC, whose names Cuesta could not recall, introduced the speakers. He testified that the speakers were Carina (Hunt), Eddie, and Pat, although he did not recall specifically who spoke at which meeting. Cuesta also did not recall the specifics as to what said at these meetings, but testified that there was a Power Point representation about the National Labor Relations Act, and that the Guide was also distributed. A "hardcopy" of the slides used in the Power Point presentation was admitted (R. Exh 29), which Cuesta testified was used by the presenters during the first eight meetings he attended. Cuesta, however, could not verify that every slide in the presentation in Respondent's Exhibit 29 was actually shown in the eight meetings he attended. Cuesta was the presenter in a second set of eight meetings on the second week of June, during which he used a revised Power Point presentation introduced as Respondent's Exhibit 30, which he received from consultant Carina Hunt. (Tr.1971-1979, 1990-2002, 2037; P. Exhs. 29; 30.) I note that Cuesta admitted during cross-examination that there were many more mandatory meetings held than the 16 he attended. He also admitted that many comments were made by the presenters during the meetings he attended, some in response to questions, were not part of the "script," or contained in the slides that were part of the Power Point presentation. He had no specific recollection as to the nature of these "off script" comments or recollection as to who made such comments. (Tr. 2017-2024.)

Cuesta's over-all recollection of events was very poor, and indeed the words "I don't recall" or "I don't remember" appear multiple times throughout his testimony. I found his testimony was not helpful in determining exactly what occurred during these mandatory meetings, and I question whether Cuesta truly did not recall certain events or was simply trying

<sup>61</sup> At this meeting, as well as in most others, a blue booklet entitled "Basic Guide to the National Labor Relations Act" (the Guide ), which is published by the Board, was distributed to those attending (P. Exh. 16).

<sup>62</sup> The evidence suggests that Respondent held more than 60, and perhaps as many as 75, mandatory employee meetings during the first 3 weeks of June, attended by over 900 nurses, according to the employee sign-in sheets as well as the summary prepared by the Union. (P. Exh. 55.)

to avoid making an admission that might be harmful to Respondent's case. Thus, I found his credibility wanting. As mentioned earlier, there were no other witnesses called by Respondent to address the Union's allegations as to what occurred during the numerous mandatory meetings.

Accordingly, the comments that Villareal, Saltos, Thompson, and Hanchett, testified were made by the presenters at the mandatory meetings were not contradicted or denied, and since I have credited their testimony, I conclude that the comments were made exactly as they described. Additionally, I note that there is no evidence showing that the "Power Point" presentation contained in Respondent's Exhibits 29 and 30 was in fact shown in all 60-70 mandatory meetings. The only evidence in the record is that these Power Point presentations were shown in the 16 meetings Cuesta attended, and perhaps the ones that Hanchett, Thompson, and Saltos attended, since they acknowledged such presentations were made.<sup>63</sup>

The statements described by Villareal, Saltos, and Thompson regarding the budgetary "pie" made in these meetings invite close scrutiny. It is perfectly valid, legal, and thus not coercive for an employer to inform its employees that it is not obligated to agree to any union proposals during collective bargaining, or even to inform them that collective bargaining amounts to a "roll of the dice," that could result in worse benefits or pay. See, e.g., *Mediplex of Connecticut, Inc.*, supra; *City Market, Inc.*, supra. It is another matter altogether, however, to imply that any gains achieved in collective bargaining will inevitably come at a price, such as the loss of ancillary staff that would make working conditions more onerous. This is what Respondent's agents, its presenters, did during the mandatory meetings. By stating that the "pie" was only so big and that any bigger "piece" gained by the nurses in negotiations would result in a smaller piece for others, such as certified nurse assistants (CNAs) who could lose their jobs, Respondent was impliedly threatening to make working conditions more onerous for nurses if they voted for the Union. Moreover, I note the "pie" analogy is a patently false one. Just like baked pies can be made bigger by getting a bigger pan, budgets are not invariably set in stone, but have a certain degree of malleability that can be achieved through increased efficiencies, transfer of assets between departments, cost reductions, and increased revenues. More importantly, these "pie" comments cannot be considered in isolation, but must instead be considered in the context of other recent events that imparted a coercive flavor to the pie analogy. Thus, as described in the discussion regarding Objections 1 and 2, on the very day the petition was filed, Respondent announced a significant (over 30 percent) increase in on-call pay (OCP). Although I found such raise not to be objectionable, despite its timing, for Respondent to now suggest that any bigger piece of pie achieved by the Union would come at a price sends an indelible and unavoidable message to employees: your employer can grant pay raises at will, never mind the size of the pie, but association with the union will result in rationing. Such is the essence of coercion during a critical pre-election period.<sup>64</sup>

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<sup>63</sup> Yet, there is no evidence that the Power Pont presentation they watched was the same as that in R. Exhs. 29 or 30.

<sup>64</sup> I also note that Villareal testified that the presenter stated that if the Union came in managers would no longer have an open-door policy. I find that this statement also represents a threat of more onerous working conditions. On the other hand, I find that part of a conversation overheard by nurse Karen LaCoste between fellow nurse Wendie Chandler and ICU manager Allan Hege, was insufficient to establish objectionable conduct. LaCoste testified that on June 18, as she approached Hege's office, she overheard Hege say to Chandler "I couldn't do this if the Union was here. According to LaCoste, Chandler was holding a request-for-time-off form in her hands as she stood at the door of Hege's office. (Tr. 230-36; P Exh. 10) Based on this partial conversation, LaCoste surmised

Likewise, the manner in which the presenters at the mandatory meetings spoke about the situation in Sutter Tracy also invites close scrutiny. Unlike the May 21 staff meeting, where comments by Adkins concerning the situation in Sutter Tracy was immediately preceded by her valid and noncoercive message that the employer is not obligated to agree to union demands, and that the resulting lengthy bargaining in Sutter Tracy had resulted in a wage freeze, it is not clear that the presenters at some of the mandatory meetings made such disclaimers. While it true that some of the slides in the Power Point presentation addressed the issues of what could occur during collective bargaining, including the disclaimers that Respondent was not obligated to agree to any particular proposals, that collective bargaining was a gamble, and that negotiations could be protracted (R. Exh. 30), there is no evidence that such presentation was made at the meeting attended by Villareal and a number of other nurses. According to Villareal, the presenter stated that if the Union came in the nurses could not get raises during negotiations, and that such negotiations could take a long time. While the statement regarding the possible length of the negotiations is a valid one, the statement regarding not being able to get raises during negotiations improperly and incorrectly suggest that this is the inevitable result of collective bargaining. Although it is well settled that the status quo must be preserved during negotiations, preservation of the status quo only means that consent by the other side must be obtained before a change is implemented. For example, an employer that planned to give a yearend bonus or wage raise to its employees before they chose to be represented by a union could simply inform the union of the planned raise and ask if it has any objections. If the union has no objection, the employer is free to grant the planned increase.<sup>65</sup> Thus, the statement that no raises could be given to the nurses during negotiations is false, and implies that voting for the Union would result in a wage freeze, potentially for a protracted period. I also note that in a separate meeting, “Eddie ” who was the presenter, made a similar comment that the nurses at Sutter Tracy could get no raises while negotiations were taking place, according to Hanchett’s testimony. I find that these comments, like the ones made in the meeting attended by Villareal, imply both the futility of choosing the Union as a representative, as well as a threat of worse conditions to come as the result of voting for the Union. In so finding, I note that the situation at Sutter Tracy was not an abstract, remote, or theoretical example of what could go wrong in collective bargaining, but rather involved a sister facility of Respondent where the nurses had chosen the (same) Union as their collective-bargaining representative. By repeatedly reminding the nurses at MMC of the wage freeze the nurses at their sister facility had had to endure during negotiations, and particularly by using language suggesting that this was the inevitable result of collective bargaining, Respondent hammered home the coercive implication that MMC nurses would suffer the same fate. I conclude such statements were coercive.

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that Hege was talking about a request by Chandler for time off, and that he was in fact saying that he could not grant such requests if the Union represented MMC employees. I am not persuaded that this partial conversation is sufficient to meet the Union’s burden of proof, particularly in light of the fact that LaCoste only heard a very short part of the conversation between Chandler and Hege, neither of whom testified.

<sup>65</sup> The fact that this seldom occurs in practice does not diminish the coercive nature of the statement. Obviously, employers usually do not want unions to receive undeserved credit for a wage raise, and unions may not want its members to know that they would have received a raise even without their help, or may want to make such raise part of a wider agreement, such as a contract. These political realities do not, however, grant employers carte blanche to make the false and coercive statement that choosing a union as collective-bargaining representative will inevitably result in a wage freeze while negotiations take place.



Applying the factors as set forth in *Cambridge Tool & Mfg.*, supra, to the above events, I note that the comments I have found to be coercive were uttered in group meetings attended by numerous nurses, and thus received wide dissemination; the comments were not made at a single meeting but instead at multiple meetings; the comments were likely to induce fear that choosing the Union would result in more onerous conditions or that choosing the Union would be an exercise in futility; and that the meetings occurred during the critical period up to a few days before the election. The sum of these factors leads me to conclude that such conduct could very well have affected the outcome of the election, even though margin was 110 votes. Accordingly, based on the comments made at the mandatory meetings by agents of Respondent, I recommend that Objections 16, 17, 18, and 21 be sustained.

### *B. The DVD*

It is undisputed that in June, about 7 to 10 days before the election, Respondent sent all the unit employees a DVD, urging them to watch it by June 25, the day before the election. Accompanying the DVD was a colored printed sheet with the following message from Respondent's CEO, Daryn Kumar, which read as follows:

**NOW** is the time. Get the **FACTS**. Be sure to **VOTE NO on June 26/27**

**Please take some time to view the enclosed DVD**

As the election nears, the leadership team and I remain committed to providing information for you to consider before you go to the voting booth to cast your secret ballot.

We firmly believe we can continue to accomplish our goals without the involvement of an outside party.

We encourage you to discuss the issues with your family, friends and coworkers, and when it comes to vote, we hope you will **VOTE NO**.

/S/ Daryn J. Kumar, Chief Executive Officer

#### **Election Dates and Times**

Thursday, June 26-15:00-16:00 and 18:00-21:00

Friday, June 27-06:00-09:00 and 18:00-21:00

#### **Location**

OR Conference Room, 2<sup>nd</sup> Floor, North Tower

**Vote NO on June 26/27 Sutter Health Memorial Medical Center**

The Enclosed video is a fictional account of events that may or may not occur and should not be construed as a threat or promise of any kind by Memorial Medical Center. Collective Bargaining can result in a variety of different outcomes. This fictional account depicts just one of many possible outcomes that could result from collective bargaining.

The above text approximates the type and size of the font used in the enclosed message. The very last paragraph above will be referred to as “the disclaimer.” (P. Exh. 2.) The DVD itself, on its face, contains the MMC logo and Title “Sutter Health Memorial Medical Center,” and a message that reads “An Urgent Message from Memorial Medical Center,” and “Please view by June 25<sup>th</sup>.” (P. Exh. 3.) In the video, which is entitled “The Nightmare,” actors play the roles of fictional MMC employees, union representatives and negotiators, and Respondent managers and negotiators.<sup>66</sup> The narrative tells the story of what happens after the Union wins the election and the parties start collective-bargaining negotiations, events that occur during a dream of an employee concerned about how she is going to vote. Those negotiations drag on for almost a year, very few items are agreed to, and in the meantime employee wages and other benefits are frozen. In the end, employees go on strike in response to a “last and best offer” by MMC which reduces some of the employees’ benefits, while their wages remain the same.<sup>67</sup> Additionally, there are a couple of references to “Sutter Tracy” in the dialogue, once by an actor portraying a Sutter employee, the other by an actor portraying an MMC negotiator. In the video, after a few months of negotiations, an employee implores one of the bargaining committee employee members not to allow the negotiations turn into another “Sutter Tracy,” impliedly referring to the frozen wages during the interminable negotiations. (R. Exh. 17, p. 23.) Later on, an angry worker again confronts one of the negotiators, stating “. . . you know no one gets a raise while this thing drags on, right?” (R. Exh. 17, p. 24.)

Additionally, the dialogue in the video contains references to the budget “pie” discussed in the previous section. In the video, a management representatives during the fictional collective-bargaining negotiations inform the union negotiating team that “they should think of pay and benefits like a pie,” adding “we are not prepared to make the pie bigger,” and that “the only way we are willing to increase some of the slices of the pie is if we made other slices smaller.” (R. Exh. 17, p. 16.) Later, one of the management representatives states, “And we’ll likely lose some nursing assistants as well. As a hospital, our operating costs have gone up, not the least of which are costs we now incur because of the presence of the union and the process of collective bargaining. The money has to come from somewhere.” (R. Exh. 17, p. 27.)

The video, I conclude, only repeats many of the comments made at the mandatory meetings discussed in the previous section, comments that I concluded were coercive. The only thing that sets the video apart from the mandatory meetings, if anything, is the presence of “the disclaimer” which appears in print on screen at the very start of the video, just as it appears in the enclosed message from Respondent’s CEO. As set forth above, such disclaimer informs the audience—the unit employees at MMC—that the events portrayed in the video are “a fictional account of events that may or may not occur, and should not be construed as a threat or a promise” and that the dialogue or narrative of the video “depicts just one of many possible outcomes that could result from collective bargaining.” In light of my previous conclusions regarding the nature and impact of the statements made at the mandatory meetings, many of

<sup>66</sup> A script of the DVD, including the names and roles of the different characters portrayed, was admitted as R. Exh. 17. I found the script to be an accurate representation of what occurs in the video, particularly its dialogue, except that the script indicates that the “disclaimer” cited above appears both at the beginning and end of the video presentation. In the video, however, the disclaimer appears on the screen for about 22 seconds at the very start, but *not* at the end.

<sup>67</sup> In the video, the Union is depicted as only caring for money, and its representatives primarily concerned with getting a security clause and union-dues check-off clause in the contract, with all else being secondary.

which are repeated in the video, the issue is thus whether the “disclaimer” cleanses or neutralizes the coercive effects of the statements at issue. I conclude that it does *not*, because the damage had already been done, and such disclaimer was too little, too late.

5           Indeed, there is evidence that employees either did not notice or did not believe the disclaimer at the beginning of the video, particularly in light of the comments that had been made during the mandatory meetings. Lori Silva, whose testimony I have previously credited, testified that immediately following the distribution of the DVD by Respondent, she received phone calls from several nurses who were fearful that the stark scenarios being depicted in the video would come to life. (Tr. 80.) The facts of this case can thus be distinguished from those in *Medieval Knights, LLC*, 350 NLRB 194 (2007), or *Manhattan Crowne Plaza*, 341 NLRB 619 (2004), where the Board held that employees could reasonably distinguish between fictional accounts of what could occur in negotiations and predictions—or threats—of what their employers would actually do. Moreover, in those cases there was no history of coercive conduct that preceded the video or other fictional representation of what could happen in negotiations.

20           Finally, in my view, the above facts raise an issue as to whether the printed disclaimer that accompanied the video, and which briefly appears on screen at the start of the video, is sufficient in light of the medium in which the rest of the message is conveyed. In this day, more than 100 years after the invention of motion pictures, there can be no reasonable doubt that images portrayed on a screen, particularly when accompanied by dialogue and sound effects, can convey a message far more powerfully and memorably than mere printed words can. If it is true that a picture is worth a thousand words, we need to ask how many printed disclaimers is a video worth, given its vastly superior mechanism of conveying a message. Clearly, there is a significant disparity and sharp contrast between the stark printed disclaimer accompanying the video, including its short-lived appearance on the screen, and the living images that follow. Given that the Board’s mandate is to preserve laboratory conditions during the pre-election period, I believe that at minimum the Board should require that any disclaimers be commensurate with the medium in which the rest of the message is conveyed. Thus, if the underlying message is delivered visually and verbally by persons or narrators that appear on film, any disclaimers should be delivered in the same manner, not veiled in a printed message unlikely to be read or remembered. Given the power of film, any other method of delivery would distort and upset the fine equilibrium that laboratory conditions demand.<sup>68</sup>

35           Accordingly, and for the reasons set forth above, I recommend that Objections 16, 17, 18, and 21 be sustained.

### Objection 23

40           23. Respondent, through its supervisors and/or agents, restrained and coerced employees, interfered with laboratory conditions and made a free election impossible by creating a marked security presence around union representatives and employee union observers as they travelled from the hospital entrance to and from the voting room, causing employees,

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<sup>68</sup> There is no clear precedent regarding this precise issue, but there is precedent supporting the proposition that disclaimers can be rendered meaningless by the message that follows. *Wallace International de Puerto Rico, Inc.*, 328 NLRB 29, 40-41 (1999).

especially those lined up to vote once the polls opened, to associate the Union with fear and permanently heightened security in the workplace.

The Union alleges that Respondent had security guards escort union representatives and employee observers from the hospital lobby to and from the conference room where the pre-election conference and election was held, asserting that this created the coercive image about the Union for employees that were present.

In support of this objection the Union offered the testimony of its representative, Alyssa Kang, and one of its employee election observers, Melanie Thompson. Kang testified that on June 26, around 1:30 p.m., she along with fellow Union Representatives Joe Schuman, Roy Hong, and Mariana Zapata, as well as Thompson and fellow election observer Jan Stambaugh, arrived at the MMC's lobby on their way to the pre-election conference. According to Kang, they were met at the lobby by three uniformed security officers, one of them named Chuck, who informed the group that they would escort them to the pre-election conference. The pre-election conference was to be held at a conference room on the second floor, the same location as the election that was to follow. According to Kang, the security officers led the group to the elevator, which they all boarded on their way to the second floor. Upon reaching the second floor, the guards escorted the group down the hall to the conference room, but the guards did not remain there for the conference. At the end of the conference, the guards again escorted the union group from the conference room to the elevator and out to the lobby and then to the lobby doors, where they exited. Later that same afternoon, shortly before 3 p.m., Kang as well as fellow Union Representatives Roy Hong and Linda Morales, along with Thompson and Stambaugh, again arrived at MMC's lobby, on their way to the opening of the polls. They were again met at the lobby by the security guards, who escorted them to the conference room. According to Kang, this time there were numerous nurses lining up outside the conference room to vote at the election, which was set to start at 3 p.m. After dropping off their two observers for the election, Thompson and Stambaugh, the union group departed, and were again escorted by security guards all the way to the lobby. The same process was repeated at 4 p.m., when the polls closed: Kang and Hong were again escorted by security guards from the lobby to the conference room, and then again when they were ready to leave after the pools closed. Kang described the security guards escorting them as being physically close to and surrounding the group, as if they were being "pinned" or herded. (Tr. 973-984, 1024-1025.)

Thompson's testimony corroborated Kang's account of the escort by security guards on June 26, also confirming the close physical proximity of the guards, adding that she felt like they were "convicts" being brought to prison. (Tr. 737-745.)

Jennifer Heckathon, public safety supervisor for Respondent, testified that she was one of two (not three) security officers who escorted the union group to and from the conference room on June 26.<sup>69</sup> Heckathon's version differs from Kang's and Thompson's in that she testified they escorted the union group only on the way to the conference room, not on the way back. Additionally, she disputed that the guards were physically close to the union individuals, asserting that they were at a normal distance as part of the group. (Tr. 1945-1952.) I credit

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<sup>69</sup> Thompson testified that there were initially three guards who provided the escort, but then there were only two. It is not clear at which point the third guard dropped out of the picture.

Kang's and Thompson's version because they corroborated each other, and I have previously found Thompson to be a credible witness.

I note that there is no evidence that the security guards treated the union group discourteously or disrespectfully, despite Thompson's and Kang's subjective feelings that they were being marched like prisoners. Indeed, Heckathorn struck me as an individual who conducts herself in a professional manner, and there is no evidence that the union group was treated otherwise. Thus, to the extent that there was objectionable conduct, the key lies in whether escorting the union officials to and from the conference room, without more, constitutes coercive conduct. I conclude that such conduct is not inherently coercive, and was not in this case. The Union cited several cases, including *Lyman Steel Co.*, 249 NLRB 296, 302-303 (1980); *Intermedics, Inc.*, 262 NLRB 1407, 1414-1415 (1982); *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 500-504 (1995); and *Sands Hotel & Casino San Juan*, 360 NLRB 172 (1992), that are inapposite, all having to do with surveillance. In this instance, the guards were not engaged in anything that can remotely be described as surveillance, but were rather escorting the group into an admittedly nonpublic area of the hospital. Respondent cites *Mountaineer Park, Inc.*, 343 NLRB 1473, 1483-1484 (2004), which I find is more on point, that involves similar albeit not identical conduct as in the present case. In that case, the employer's security officer escorted the union officials to and from the polling area, although the main conduct that was examined was his standing outside the door that lead to polling area during the election. None of the security official's conduct, including the escorting of union officials, was found to constitute objectionable conduct.

In light of the above, I conclude that the escorting of the Union's group by Respondent's security officers to and from the pre-election and postelection meetings, without more, is not objectionable. Accordingly, I recommend that Objection 23 be overruled.

In sum, I conclude that Objections 4, 16, 17, 18, and 21 have merit and recommend that they be sustained. I also conclude that Objections 1, 2, 3, 5, 6, 7, 8, 9, 10, 11, 14, and 23 lack merit and I recommend they be overruled.

### CONCLUSIONS OF LAW

1. By posting the previously described side notice next to the Board notice, Respondent failed to comply with the Board Order and remedy in Case 32-CA-098873, and should be required to re-post the notice to employees for the requisite period of 60 days.

2. Respondent has engaged in objectionable conduct warranting the setting aside of the results of the election held on June 26-27, 2014, and the conduct of a new election.

### REMEDY

Having found that Respondent failed to comply with the remedial order in Case 32-CA-098873, I find that it must be required to post the notice to employees attached as an appendix.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>70</sup>

### ORDER

The Respondent, Sutter Central Valley Hospitals, d/b/a Memorial Medical Center, Modesto, California, its officers, agents, successors, and assigns, shall

1. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facilities in Modesto, California, copies of the attached notice marked "Appendix."<sup>71</sup> Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 19, 2012.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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<sup>70</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>71</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

I FURTHER RECOMMEND that the Board set aside the results of the June 26-27, 2014 election and direct a second election be held by secret ballot in the unit found appropriate whenever the Regional Director deems appropriate.<sup>72</sup>

Dated, Washington, D.C. March 31, 2015



Ariel L. Sotolongo  
Administrative Law Judge

<sup>72</sup> I grant the Union's January 23, 2015 motion to correct the transcript, opposed to by Respondent, to the extent reflected below. The transcript, totaling 2105 pages, had numerous errors, and some of the corrections below are mine. I found the following corrections to be supported by my notes and independent recollection, as well as the context of the testimony: Tr. 167, line 17, "unannounced" should be "announced;" Tr. 201, line 15, "sway" should be "say;" Tr. 326, line 9, "were" should be "went;" Tr. 330, line 18, "trucks" should be "times;" Tr. 336, line 12, "MR. WHITE" should be "THE WITNESS;" Tr. 579, line 19, "can" should be "can't;" Tr. 592, line 21, "pleas" should be "employees;" Tr. 593, line 7, "but" should be "put;" Tr. 330, line 18, "trucks" should be "times;" Tr. 601, line 12, "in" should be "and;" Tr. 613, line 10, "on college" should be "oncology;" Tr. 621, line 11, "I" should be "are;" Tr. 768, line 11, "RB" should be "NLRB;" Tr. 850, line 7, "break" should be "break room;" Tr. 886, line 8, "Lori" should be "Roy;" Tr. 894, line 7, "Lori" should be "Roy;" Tr. 1013, line 10, "around" should be "beyond;" Tr. 1025, line 22, "poles" should be "polls;" Tr. 1270, line 10, "four" should be "before;" Tr. 1313, line 10, "Have" should be "Half;" Tr. 1334, line 9, "on" should be "than;" Tr. 1389, line 11, "2013" should be "2014;" Tr. 1409, line 13, "recalled" should be "received;" Tr. 1413, line 13, "surprised" should be "supervised;" Tr. 1451, line 18, "lied" should be "relied;" Tr. 1679, line 5, "exception" should be "instruction;" Tr. 1794, line 19, "administerial" should be "ministerial;" Tr. 1795, line 1, "administerial" should be "ministerial;" Tr. 1865, line 18, "goes" should be "close;" Tr. 1879, line 19, "folks" should be "focus;" Tr. 1878, line 1, "drake" should be "break;" Tr. 1909, line 19, "Carson" should be "Garrison;" Tr. 1942, line 19, "he's" should be "she's;" Tr. 1986, line 13, "put" should be "cut;" Tr. 1997, line 7, "prodigy" should be "progeny;" Tr. 1794, line 19, "providence" should be "provenance;" Tr. 2010, line 23, "seven" should be "set of;" and, finally, Tr. 2078, line 1, "series" should be "Ceres."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union  
Choose representatives to bargain with us on your behalf  
Act together with other employees for your benefit and protection  
Choose not to engage in any of these protected activities

WE WILL NOT solicit employee grievances during a union organizational campaign in a manner that explicitly or implicitly promises to remedy those grievances.

WE WILL NOT tell our employees that they are not permitted to engage in union solicitation on behalf of the California Nurses Association/National Nurses United (CNA/NNU) or distribute literature on behalf of the CNA/NNU at times and places that comply with our written policy concerning solicitation and distribution.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in their exercise of the rights guaranteed them by Section 7 of the Act.

SUTTER CENTRAL VALLEY HOSPITALS,  
d/b/a MEMORIAL MEDICAL CENTER

\_\_\_\_\_  
(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)



The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlr.gov](http://www.nlr.gov).

1301 Clay Street, Federal Building, Room 300N  
Oakland, California 94612-5211  
Hours: 8:30 a.m. to 5 p.m.  
510-637-3300.

The Administrative Law Judge's decision can be found at [www.nlr.gov/case/32-CA-098873](http://www.nlr.gov/case/32-CA-098873) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.



**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 510-637-3270.